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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JANICE E. HETZEL,
Petitioner,

v.

COUNTY OF PRINCE WILLIAM and CHARLIE T. DEANE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a trial judge determines that a jury's compensatory damage verdict is not excessive, is based on substantial evidence, and is predicated on evidence of emotional distress that was "entirely unrebutted," may a federal appellate court, consistent with the Re-Examination Clause of the Seventh Amendment, vacate that damage award without according substantial deference to the determination of the trial judge?

2. In this case where the jury awarded Petitioner $750,000, the trial judge upheld an award of $500,000, and the court of appeals suggested an award slightly in excess of $10,000 would be appropriate, was it proper for the appellate court to vacate the lodestar award of attorney's fees and costs and to hold that Petitioner "is not entitled to an award of significant, much less full, attorney's fees"?

3. Did the appellate court properly conclude that a four-year-long series of failures to promote the Petitioner, combined with falsely adverse performance evaluations, undesirable duty assignments, differential discipline, and other abusive treatment, could not "possibly constitute adverse retaliatory action" as either outside the statute of limitations or as not depriving Petitioner of a "valuable governmental benefit"?

4. Was it proper for the appellate court to refuse even to consider Petitioner's cross-appeal?

LIST OF PARTIES TO THE PROCEEDING

The petitioner, Janice E. Hetzel, was the plaintiff below and appellee in the Court of Appeals.

Respondents County of Prince William (Virginia) and Charlie T. Deane were defendants below and appellants in the Court of Appeals.

G.W. Jones and C.E. O'Shields were defendants in the trial court, but were not parties to the appeal and are not respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI

CITATION OF THE REPORTS OF OPINIONS IN THE CASE

The decision of the Court of Appeals is reported officially as *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), and unofficially as *Hetzel v. County of Prince William*, 71 Fair. Empl. Prac. Cas. (BNA) 520 (4th Cir. July 11, 1996).

The Memorandum Opinion of the district court, which is unreported, is reproduced in full in the Appendix. *Hetzel v. County of Prince William*, C.A. 94-919-A (E.D. Va. April 5, 1995).

STATEMENT OF THE BASIS FOR JURISDICTION

The opinion of the Court of Appeals in this matter was issued on July 11, 1996. No petition for rehearing

or motion for extension of time in which to file this petition has been filed.

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1) to review the judgment in question by writ of certiorari. The order of the district court from which an appeal was taken to the Court of Appeals was a final order, and jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are set forth verbatim in the Appendix.

The statutes and provisions involved are the First Amendment to the Constitution of the United States, U.S. Const., Amdt. 1; the Fourteenth Amendment to the Constitution of the United States, U.S. Const., Amdt. 14; the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a); and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

This Petition raises important questions regarding the nature and quantum of proof of emotional distress damages in federal employment discrimination litigation—as well as an appellate court's authority, consistent with the Seventh Amendment, to invalidate the careful and deliberate decision of a jury which has been confirmed by the trial judge, respecting the peculiarly fact-intensive issue of emotional damages.

This Petition also raises significant issues relating to the discretionary award of attorney's fees by the trial court; if the Court of Appeals is correct that a prevailing civil rights plaintiff obtaining an award of over $10,000 is "not entitled to an award of significant . . . attorney's fees" (rather than the lodestar amount expressly found reasonable by the trial court), the statutory directive that

victims of unlawful retaliation obtain full legal representation in hard fought civil rights cases is gravely at risk.

This was a civil action alleging unlawful discrimination and retaliation in the course of defendants' employment of Petitioner Janice E. Hetzel. Petitioner was, and is, the only female Hispanic police officer in the Prince William County Police Department.

Officer Hetzel brought harassment, discrimination, and retaliation claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, as well as under 42 U.S.C. § 1983 alleging violations of the Free Speech Clause of the First Amendment (made applicable to the defendants by operation of the Fourteenth Amendment) and violations of the Equal Protection Clause of the Fourteenth Amendment. The district court assumed jurisdiction of the case pursuant to 42 U.S.C. § 2000e(5) and 28 U.S.C. § 1343. The Court of Appeals reviewed the final judgment of the district court pursuant to the authority conferred by 28 U.S.C. § 1291.

A. Factual Predicates for Petitioner's Claims

Officer Hetzel, an Hispanic female U.S. Marine Corps veteran with a B.A. in science, joined the Prince William County, Virginia, Police Department in March of 1986. She is a certified crime scene technician, a hostage negotiation team member, and a certified criminal justice instructor. At the time of trial Officer Hetzel had earned Officer Of The Month from the Department four times.

In order to seek "fairness" in promotion decisions, the Department obtains and utilizes the results of an independent Assessment Center when considering candidates for promotion. In the words of the Assessment Center's Final Report (June 1994), the multi-day assessment provides "rank ordered lists of candidates eligible for" promotion. It "samples and measures job relevant behaviors

rather than a variety of abstract personality characteristics which may be only remotely related to a candidate's job performance." [1]

In 1992, over three score eligible police officers completed the Assessment Center process for promotion to sergeant. Of the 71 officers on the July 1, 1992 list, Officer Hetzel ranked first. However, she was not promoted, while three officers ranked below Officer Hetzel, including number 2, were promoted. Of the 78 eligible officers on the Assessment Center list for July 1, 1993, which was based on the same assessment, Officer Hetzel again ranked first. Again, Officer Hetzel was not promoted, although a lower-ranking officer was promoted.

A new assessment was performed for the July 1, 1994 eligibility list; in that assessment, Officer Hetzel ranked second out of 94 eligible candidates. She was not promoted although the white male who ranked first, as well as the white male who tied her score, were promoted immediately. Another male officer, who ranked tenth, was also promoted. On the July 1, 1995 eligibility list, again based on the 1994 assessment, Officer Hetzel was again ranked second, out of 96 eligible candidates; since the officers ranked first and tied for second had been already promoted, Officer Hetzel was the highest-ranked officer remaining on the list. Notwithstanding, the officers ranked eighth, tenth, and tied for twenty-third have been promoted. Officer Hetzel still has not been promoted.[2]

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[1] Candidate Orientation for the Rank of Sergeant, Prince William County Police Department.

[2] Officer Hetzel's second-level supervisor, First Sgt. John Collier, testified she has "excellent judgment" and "really looks at the whole picture." Sgt. Collier testified that Officer Hetzel is qualified to be a supervisor, and that he has recommended her promotion to sergeant based on comparisons of Officer Hetzel to other officers on the assessment list. Officer Hetzel's immediate supervisor before trial was Sgt. Dennis Thompson, a 21-year force veteran who had supervised her for 20 months as of the time of trial. Sgt. Thompson

One of the primary issues presented to the jury in this case was to determine the reason why Officer Hetzel was not promoted, while many lower-ranking officers were promoted over her.[3] When Officer Hetzel asked defendant Chief Deane, before this litigation, why she had not been promoted, his only reason was a reference to her "disciplinary" record. At trial, this explanation expanded, *post hoc*, to include claims that Officer Hetzel was not a "team player" and was unable to accept "constructive criticism." For example, at trial defendants confronted Officer Hetzel with a "tardy slip" showing her five minutes late for roll call many years before trial. However, as Chief Deane admitted on the stand, he has promoted numerous individuals "who have had serious disciplinary records" and who are "not team players." [4]

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testified that "she has been an exceptional, gifted officer. . . . She is cooperative, hard working, needs very little supervision." "[S]he has excellent judgment" and "has not presented the first disciplinary problem at all."

[3] Although Officer Hetzel had been Officer of the Month four times as of the time of trial, none of the officers promoted by Chief Deane since 1992 have been Officer of the Month more than twice, and over 80% have never been so recognized.

[4] Chief Deane testified, for example, that one officer promoted to a higher rank was on probation at the time of the promotion for lying about evidence in a murder case. Another officer, promoted to sergeant and then first sergeant during this time frame, committed serious domestic violence including acts resulting in the police being called to remove *him*; shortly thereafter the officer was promoted to sergeant. Two years later, that same officer publicly "grabbed [a woman] by her hair at the base of her neck at least two times," pushed her "through both sets of front double doors to the outside parking lot" to a truck; "pushed her from behind with one hand and forced her head and chest area onto the hood windshield area of the truck, lifting her feet off the ground. [The witnesses] felt that her head hit—that her head had struck the truck." While Chief Deane initially sustained the complaint—the officer "has been accused of similar events in the past. There will be no more warnings"—defendant recinded the probation: "On

The jury concluded that, in fact, Officer Hetzel had not been promoted, and has been subjected to other disciplinary and adverse action, in retaliation for her multiple complaints of discrimination and harassment in the Department. The trial judge found this determination was amply supported by the evidence, and the Court of Appeals affirmed the jury's determination of liability on this basis.

Officer Hetzel's problems in the Department began in 1989, when she gave a statement in an internal investigation of racism in the department. "I was asked if there was racism among the vice narcotics unit, and my answer to that was yes." Officer Hetzel explained that the term "nigger" was used "very often in the unit," and noted that another officer made the comment, "If my daughter ever married a nigger, I will kill the nigger, and I['d] rather have her dead." [5]

The testimony at trial established that, beginning immediately after this investigation and continuing for years, Officer Hetzel was given the "cold shoulder" by her unit, the vice and narcotics squad, because of her status as a "so-called snitch." Officer Hetzel requested a transfer from that unit; her supervisor, Sergeant Sullins, told her that she would be missed because she had the most arrests

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second thought let's let this die. . . . Getting soft in my old age." The officer was promoted in July 1994 to first sergeant. Chief Deane testified: Q: "Did you think that this event was less serious than the totality of everything Officer Hetzel has ever done in her career?" A: "I thought this was very serious. . . ." Q. "Do you think it was more serious than everything Officer Hetzel has ever done wrong in her career with the Prince William County Police Department?" A. "It's a difficult comparison. I don't know that I can make that comparison."

[5] The officer who made this comment was later promoted by defendant Chief Deane to detective. Another officer, who admitted to referring to a civilian as a "nigger," was also promoted to First Sergeant by Chief Deane.

in the unit, and that she was "actually carrying the heavy workload within the unit." At the same time, this supervisor also "lecture[d]" Officer Hetzel "as to how blacks came to the United States," and noted that blacks had not been in management positions until the last ten years. Sgt. Sullins then told Officer Hetzel that "if I would have kept my mouth shut, he could have made me a detective within two years. . . . He went on to tell me how I screwed up by doing that [*i.e.*, giving the investigatory statement on race discrimination], and in other words, how big a loser I was going to be from there on." [6]

These words proved prophetic: Officer Hetzel was finally transferred in September 1989 and came under the supervision of Sgt. Jones. However, the retaliatory conduct did not abate; she was again given the cold shoulder, other officers avoided her, and she was assigned to remote areas. Sgt. Jones confirmed to Officer Hetzel that she was not trusted by her fellow officers because of her statements about racism to Internal Affairs. Sgt. Jones reminded Officer Hetzel that he could "make" her or "destroy" her.[7] Officer Hetzel's superior, Lt. Summers, confirmed to her that if she complained about Sgt. Jones, it would merely "piss off" her superior officers, "and I would never reach my goals." Lt. Summers told Officer Hetzel (when she was passed over for promotion in favor of Sgt. Williams, a lower-ranked white male with less service time than Officer Hetzel) that she "would be the perfect candidate if [she had not] filed a grievance earlier, 1990, and pissed them off, and that [Officer Hetzel] needed to play the game in order to get ahead."

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[6] Sgt. Sullins has since been promoted by Chief Deane to Lieutenant.

[7] Sgt. Jones made a derogatory racial reference—asking if a black officer was related to "Kunta Kinta" in the presence of three witnesses, and also referred to an hispanic diversity tape as "shit." Sgt. Jones received no disciplinary action for either event, although the investigating officer in each instance found a violation of general orders and recommended disciplinary action.

In addition, beginning immediately after her statement to Internal Affairs, and continuing for years, Officer Hetzel's performance evaluations also reflected the retaliation against her. Her accomplishments were ignored; she was labeled a "nigger defender;" and she was criticized for not accepting "constructive criticism" and not being a "team player." [8] Officer Hetzel was subjected to a continuing stream of retaliatory abuse, including a series of disciplinary actions and investigations for matters which, when committed by other officers, prompted no similar discipline.

Every purported justification given by the department for failing to promote Officer Hetzel since 1992 was demonstrably false, since the department has repeatedly promoted other officers with far worse records than Officer Hetzel's exemplary one. The real reason for the differential discipline and lack of promotion was retaliatory—as the jury found and as the trial and appellate courts confirmed. Perhaps Chief Deane himself put it most directly when he admitted on the stand that an officer's complaint of discrimination would be reason to disqualify the complaining individual from promotion:

> Q: [I]f someone says, 'I think you are treating me unfairly' or 'I think you are discriminating against me,' would not that indicate that in that situation, the individual distrusted their supervisors or their supervisors' motivation?
>
> A: Certainly, that could indicate that.

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[8] Chief Deane and Sgt. Jones both admitted they were aware of no examples or conduct of Officer Hetzel to support the negative references to "failure to accept constructive criticism" on Officer Hetzel's performance evaluations during the periods covered by the evaluations. Similarly, Officer Hetzel's supervisors could not point to any evidence of Officer Hetzel failing to be a team player. In sharp contrast, Sgt. Thompson, Sgt. Collier, and Officer Hetzel's squad members, all testified that Officer Hetzel was always willing to help any other officer, and frequently went beyond the call of duty to do so. This testimony came from squad members testifying for the defense as well as for Officer Hetzel.

Q: And so, that could end up being a reason for not promoting an individual?
A: That is possible, yes.

B. The Proceedings Below

Officer Hetzel, as Petitioner, comes to this Court in a somewhat unusual procedural posture: that of a prevailing plaintiff who had also prevailed, at least in substantial part, in the Court of Appeals.

After exhausting her administrative remedies, Officer Hetzel filed her claims against defendants in the Alexandria Division of the United States District Court for the Eastern District of Virginia. Extensive discovery ensued, which was followed by defendants' comprehensive motion for summary judgment; despite over 100 pages of briefing by defendants, this motion was denied in all particulars by the district court.

Officer Hetzel's claims came on for trial in January of 1995 before the Hon. Leonie M. Brinkema. The jury heard evidence for more than a week. Defendants moved for, but were not granted, relief under Fed. R. Civ. P. 50(a). After the close of evidence and argument of counsel, the jury deliberated over the course of three days before reaching a mixed verdict: the jury found in favor of defendants on Officer Hetzel's claims of discrimination and harassment, but found in favor of Officer Hetzel on each of her three claims of unlawful retaliation.

Using a verdict form urged by defendants over Petitioner's objection, the jury awarded compensatory damages of $250,000 on each of three counts: unlawful retaliation in violation of Title VII; unlawful retaliation in violation of Officer Hetzel's free speech rights under the First Amendment, and unlawful retaliation in violation of Officer Hetzel's equal protection rights under the Fourteenth Amendment. In response to a specific inquiry from the trial judge, the jury confirmed that it had awarded a total of $750,000 in compensatory damages (rather than a total of $250,000).

Defendants moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), and alternatively for a new trial pursuant to Fed. R. Civ. P. 59(e). The district court held, as a matter of law, that in the absence of underlying discrimination no claim may be asserted for unlawful retaliation solely under the Equal Protection Clause and Section 1983 (thereby reducing the jury award to $500,000), but otherwise denied defendants' motions.

Judge Brinkema specifically found that the jury's award of damages, although substantial, was not excessive and was amply supported by the weight of the evidence:

> [D]efendants' claim that there was no evidence of damages is *patently without merit.*
>
> Defendants argue that plaintiff produced no evidence of emotional distress related to any of the alleged acts of retaliation nor proved that she suffered any permanent or lasting effects from the emotional pain. However, plaintiff testified at length as to the emotional distress she has suffered as a result of the adverse actions of which she complained. Plaintiff testified that she suffers severe headaches, stress, and interference with her family life. First Sergeant Collier, Master Police Officer Barr, and Officer Wing [all employees of the defendants] testified that plaintiff was 'devastated' by the January 15, 1995 Internal Affairs investigation and was hysterical afterwards. These witnesses also testified that they had never seen plaintiff cry before that night. Significantly, First Sergeant Collier advised plaintiff to take off the week after the interview because she was so upset and distracted. Perhaps most importantly, the jury was able to observe the plaintiff and could see that she was crying and shaking throughout most of the trial. *The evidence of plaintiff's emotional distress was entirely unrebutted.*
>
> * * * *
>
> [P]laintiff's evidence on damages was wholly unrebutted. Therefore, the weight of the evidence clearly

> favored the award. The unrebutted testimony established that plaintiff has suffered grave emotional injury. Plaintiff's injury is compounded by the nature of her occupation. A police officer's safety may be endangered if she is performing her duties while under severe emotional distress. She has also suffered humiliation as a result of breaking down before her colleagues. Plaintiff testified that she was ashamed that her squad members knew she was crying hysterically in the bathroom after the January 15, 1995 Internal Affairs interview. In light of these facts, the verdict of the jury is *hardly* outrageous or monstrous.

Memorandum Opinion of April 5, 1995 at 10-12 (emphasis added), Appendix ("App.") at 20a-21a. Judge Brinkema also awarded attorney's fees and costs to Officer Hetzel, while denying injunctive relief. Memorandum Opinion of April 5, 1995, App. at 24a-25a.

Defendants appealed, and Officer Hetzel cross-appealed. The United States Court of Appeals for the Fourth Circuit decided the appeal on July 11, 1996.[9] Judge Luttig's opinion affirmed "the jury's finding of liability on [Officer Hetzel's] retaliation claims." App. at 3a-4a. However, characterizing Officer Hetzel's testimony as to her damages as "self-serving" and lacking "corroborat[ion]," App. at 4a-5a, the Court of Appeals decided that the jury's verdict was "outrageous" and vacated the award.

Deciding for itself that, upon remand and retrial, the district court would determine that Officer Hetzel could "receive only a pittance of her original damage request," the Court of Appeals also vacated the district court's fee award as "clearly wrong." App. at 9a-10a.

Finally, the Court of Appeals decided that it did "not need to address" Officer Hetzel's cross-appeal respecting her Section 1983 claim under the Due Process Clause of

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[9] The judgment of the Court of Appeals was amended to correct certain clerical matters, not material to the disposition, by order dated August 19, 1996.

the Fourteenth Amendment. Slip Op. at 8 n.2, App. at 8a.

REASONS FOR GRANTING THE WRIT

I. THE ACTION OF THE COURT OF APPEALS IN SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE DISTRICT COURT, AND VACATING THE JURY AWARD OF COMPENSATORY DAMAGES, IS INCONSISTENT WITH THE LAW

Until quite recently, this Court had never expressly held "that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 n. 25, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).[10] Indeed, this Court's precedent suggested, with fair uniformity, that such review was not available.[11]

It is now settled, at least in diversity cases, that such review is not inconsistent with the Re-Examination Clause of the Seventh Amendment. *Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996). As the *Gasperini* Court noted:

> In contrast [to review of a trial court's decision overturning a jury verdict], appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less

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[10] This Court twice had granted certiorari to decide this issue, both times deciding the case on other grounds. *Grunenthal v. Long Island Ry. Co.*, 393 U.S. 156, 158, 89 S.Ct. 331, 21 L.Ed.2d 309 (1968); *Neese v. Southern Ry. Co.*, 350 U.S. 77, 77, 76 S.Ct. 131, 100 L.Ed. 60 (1955).

[11] *See, e.g., Wabash Railway Co. v. McDaniels*, 107 U.S. 454, 456, 2 S.Ct. 932, 27 L.Ed. 605 (1883) (that court is "without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted"); *Southern Railway Carolina Division v. Bennett*, 233 U.S. 80, 87, 34 S.Ct. 566, 58 L.Ed. 860 (1914) ("case of mere excess upon the evidence is a matter to be dealt with by the trial court" and "does not present a question for reexamination here upon a writ of error").

> secure, development. Such review was once deemed inconsonant with the Seventh Amendment's re-examination clause. . . . We subsequently recognized that, even in cases in which the *Erie* doctrine was not in play—cases arising wholly under federal law—the question was not settled. . . .

116 S.Ct. at ——. In settling the question, *Gasperini* directed the appellate courts to apply a deferential "abuse of discretion" standard in reviewing a district court determination that a jury award was not excessive. *Id.* at ——.

The manner in which the Court of Appeals proceeded in Officer Hetzel's case is flatly inconsistent with *Gasperini*'s careful adoption of an abuse-of discretion standard.[12] The opinion of the Court of Appeals in this case does not even make nodding acquaintance with the trial judge's discretion or superior knowledge of the evidence: nowhere in the relevant portion of the opinion is the properly-deferential standard of "abuse of discretion" even mentioned, much less followed.

This is pernicious error. "Trial judges have the 'unique opportunity to consider the evidence in the living courtroom context' . . . while appellate judges see only the 'cold paper record.'" *Gasperini, supra*, 116 S.Ct. at —— (citations omitted). The "trial judge, who observed the witnesses . . . was in the best possible position to assess their credibility and to absorb the subtle (and not-so-subtle) nuances of the testimony." *Wagenmann v. Adams*, 829 F.2d 196, 216 (1st Cir. 1987).[13] Rather than con-

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[12] This Court may ultimately determine, particularly in federal question cases such as this one, that no appellate review of a excessiveness challenge is consistent with the Seventh Amendment. Petitioner Hetzel invites consideration of that question.

[13] Fewer concerns are implicated when a court of appeals affirms the decision of a trial judge remitting an award; the key factor remains deference to the jurist who has seen the evidence. *See, e.g., Santi v. CNA Insurance Cos.*, 88 F.3d 192 (3d Cir. 1996) (affirming remittitur or new trial in case where $300,000 in emo-

duct a deferential review to determine if Judge Brinkema abused her discretion in confirming the jury verdict, the Court of Appeals plainly undertook an independent, and cursory, review of the paper record in concluding that Officer "Hetzel's thin evidence of rather limited damages would in-and-of itself entitle her to only a minimal damage award." Slip op. at 5, App. at 5a.

Two additional factors, one procedural and one substantive, counsel against the plenary approach the Court of Appeals used in overturning the trial judge in this case.

First, the award on appeal had already been trimmed substantially by the time the Court of Appeals received the case. Despite the jury's clear direction that $750,000 in compensatory damages should be awarded, judgment was entered in the amount of only $500,000. As Judge Selya of the First Circuit has framed the issue, "Once a verdict has been trimmed and reshaped at the hands of the trial judge, an assault on the remaining amount calls upon us not merely to grade the essay, but to grade the teacher's grading of the essay. The resultant constraints are not inconsiderable," and call for an even more deferential standard of review in the appellate court. *Wagenmann v. Adams*, 829 F.2d 196, 215 (1st Cir. 1987).[14]

Second, the approach taken by the Court of Appeals is inconsistent with the reasoning underlying this Court's opinion in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). In *Harris*, this

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tional distress damages awarded, to give deference to "judgment of the trial court"); *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498 (1st Cir. 1996) (affirming remittitur; "it would be particularly inappropriate and injudicious for an appellate court to set aside the trial court's judgment under the circumstances").

[14] Other appellate courts have also determined that a more deferential standard of review is appropriate where the jury verdict has already been adjusted by the trial court. *See, e.g., Stapleton v. Kawasaki Heavy Industries, Ltd.*, 608 F.2d 571, 574 n.7 (5th Cir. 1979); *Princemont Construction Co. v. Smith*, 433 F.2d 1217, 1221 n.25 (D.C. Cir. 1970) (per curiam).

Court unanimously concluded that a Title VII plaintiff need not allege and prove serious psychological injury to recover for injury suffered due to a hostile environment; an abusive working environment, "even one that does not seriously affect employees' psychological well-being," is actionable. 510 U.S. at 22, 126 L.Ed.2d at 302.[15]

Unfortunately, the clear effect of the ruling of the Court of Appeals in this case is to eliminate the availability of anything but nominal damages in civil rights and employment discrimination cases, save where expert psychological testimony is presented.[16] The appellate court's denigration of Officer Hetzel's evidence as lacking "corroboration"—a requirement found nowhere in the law of employment discrimination or civil rights—and dismissing her testimony as "self-serving"—as is the testimony of any party, by definition—serves substantially to limit the effectiveness of federal civil rights law to remedy the types of injury this Court found plainly actionable in *Harris*.

"The goals of the federal [civil rights] statutes are compensation of persons whose civil rights have been violated, and prevention of the abuse of state power." *Burnett v.*

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[15] The various courts of appeals are essentially unanimous that expert medical testimony is not required to prove emotional distress damages in a Section 1983 case. *See, e.g., Bolden v. Southeastern Pennsylvania Transportation Authority*, 21 F.3d 29 (3d Cir. 1994) (expert testimony as to distress not required); *Busche v. Burkee*, 649 F.2d 509 (7th Cir. 1981) (same); *Chalmers v. City of Los Angeles*, 762 F.2d 753 (9th Cir. 1985) (permitting emotional distress recovery based on plaintiff's testimony alone).

[16] It is not only substantial damage verdicts which are at issue, but—in the Fourth Circuit at least—the availability vel non of emotional distress damages based on non-expert testimony. For example, that Court very recently, and relying in large part on its decision in *Hetzel*, held that compensatory damage verdicts of only $3,000 in a Section 1983 case could not stand, despite testimony from the plaintiffs that they "felt betrayed and deceived," "devastated," "betrayed, lied to [and] used." *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996). The Court of Appeals in *Price* vacated the $3,000 jury verdicts and awarded nominal damages of $1.00.

Grattan, 468 U.S. 42, 53, 104 S.Ct. 2924, 2931, 82 L.Ed.2d 36 (1984) (citations omitted). "Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Community School District v. Stachura*, 477 U.S. 299, 306, 106 S.Ct. 2537, 2542, 91 L.Ed.2d 249 (1986).[17] And, as this Court has noted, "we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of [rights] itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff." *Carey v. Piphus*, 435 U.S. 247, 263-64, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252 (1978). That is precisely the type of evidence Officer Hetzel presented here.[18]

This is not a complex calculation; on one of those relatively rare occasions when this Court has examined compensatory damages for mental distress, Chief Justice Rehnquist wrote:

> Several witnesses testified to the extent of respondent's anxiety and concern over [defendant's] inaccurately reporting that she had been found guilty of adultery, and [plaintiff] herself took the stand to elaborate on her fears that her young son would be

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[17] To the extent reference to the common law of the state in which the trial was held is appropriate, that law is clear: Article I, § 11 of the Virginia Constitution provides that "in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." The statutes of the Commonwealth require that the "right of trial by jury as declared by Article I, § 11 of the Constitution of this Commonwealth and by the statutes thereof shall be preserved inviolate to the parties." Va. Code. § 8.01-336. *See, e.g., Painter v. Fred Whitaker Co.*, 235 Va. 631, 634, 369 S.E.2d 191, 193 (1988).

[18] The jury was instructed to award damages only for those injuries they found to have been caused by the unlawful conduct of the defendants, the speculation of the Court of Appeals to the contrary.

> adversely affected by this falsehood when he grew older. The jury decided these injuries should be compensated by an award of $100,000. We have no warrant for re-examining this determination.

Time, Inc. v. Firestone, 424 U.S. 448, 460-61, 96 S.Ct. 958, 968, 47 L.Ed.2d 154 (1976) (footnote omitted).

These principles are settled. The evidence of emotional distress in this case, viewed objectively or with due deference to the trial judge's determination, was substantial. However, the opinion of the Court of Appeals accords no deference at all either to the jury or to the decision of the trial judge that Petitioner's damages were both adequately proven and not excessive.

Emotional distress damages, which "include mental suffering or emotional anquish," are "essentially subjective" and may be proved "by one's conduct and observed by others." *Carey, supra*, 435 U.S. at 264 n.20, 98 S.Ct. at 1052 n. 20. In denigrating Officer Hetzel's testimony as consisting of her own statements, without "evidence corroborating the existence of any of her supposed specific harms," the Court of Appeals departed from permissible practice (and was wrong on the facts as well).

Officer Hetzel testified that she had been "tremendously" affected by defendants' retaliatory conduct over the past several years. She has suffered and continues to suffer severe headaches, stress, and significant and ongoing damage to her family life. Defendants' conduct has impaired her caring for her daughter, as well as day-to-day life activities. Interference in the normal activities of family life—impairment of Petitioner's ability to discharge the duties of a parent—is severe and abiding harm. The monetary value of that harm is committed to the judgment of the jury.

In addition to the testimony of Petitioner (and three other employees of the defendant County) as to damages, Officer Hetzel's sworn written statement respecting damages was also admitted into evidence. This document was

introduced by the defendants, over Officer Hetzel's objection:

> I have suffered great emotional distress, including fear of future similar events, depression, headaches, anxiety, frustration, anger, hopelessness and helplessness, and concern for my family and future within the Department. I feel betrayed, hurt, humiliated, and angry that I have been treated in a manner unjustified by my conduct. My career has been inalterably damaged.

First Sgt. Collier, Officer Barr, and Officer Wing each testified that Officer Hetzel was devastated by the 1995 internal affairs investigation, to the extent that she was hysterical and sobbing in the restroom following the interrogation. Additional corroboration for Officer Hetzel's distress came from, *inter alia*, her supervisor First Sgt. Collier, who Judge Brinkema specifically noted to have "had specialized training in stress management for law enforcement officers." As Judge Brinkema specifically found:

> Trial witnesses, including plaintiff, Master Police Officer Barr, and First Sergeant Collier testified that the January 15, 1995 Internal Affairs Investigation caused plaintiff to become hysterical and interfered with her ability to perform her duties. More importantly, First Sergeant Collier testified that the investigation *was enough to put someone, not just plaintiff*, 'over the edge,' and that *he* felt intimidated by it.
>
> First Sergeant Collier is plaintiff's current immediate supervisor and testified under subpoena in plaintiff's case in chief. First Sergeant Collier was *an extremely credible witness* who testified that he thought he was a defense witness when he was deposed. . . .

App. at 19a (emphasis added). In fact, First Sgt. Collier testified that, after the Internal Affairs retaliatory incident in January 1995: "The sense of frustration [Officer Hetzel] has been feeling in dealing with this issue of discrimination has just sort of snowballed. It just keeps getting

worse." He expressed his concern with Officer Hetzel's confidence "after all this" and explained:

> Confidence is a very key issue when dealing with the public. You are an authority figure. You have to intercede in people's lives when they may not want you there. You have to be confident in yourself, not only yourself but the people you work with, that you are going to do the right thing the first time, because oftentimes you don't get a second chance.

Sgt. Collier further explained:

> It's a cumulative effect. It wears you down over a period of time. If you put one stresser [sic] on top of another, on top of another, without all of them being resolved, it builds up. It becomes a heavy weight to bear. . . .

Officer Hetzel testified:

> I am so paranoid that they have changed me. Are you asking me if I am the same police officer? No, I'm not. . . . My quality of life, my quality of time with my friends, being so paranoid about whatever I do. It is going to come back to haunt me. . . . My stress level, I get constant on and off headaches. My quality of life—my family is very important to me, and what I do for a living is very important to me. I am very proud of this. I always keep, try to keep that balance between my family and my job, always tried to keep them separate when I went home, but separate but together. I don't know how to explain this. It's like you go home, and I am a mother, but I am also a police officer and trying to keep that balance that makes a human being happy. So many things happened to me that when I would go home, I couldn't even sit with my daughter and do homework and concentrate. . . . Especially these past few months was more drastic because I was so concerned. Monday when I went home, I felt so like a loser, because that's how they made me feel through all these years, that I was just a loser of no way out; and that is not true. I'm not a loser. I came here for my mar-

> riage, and I am going to stand for my marriage, because I am a good police officer. . . .

This evidence is not cursory: it is compelling. And the jury and trial judge were able to observe the credibility, demeanor and suffering in the way only those present can.[19]

Aside from the mere size of the jury verdict, the Court of Appeals could point to no error in the conduct of the trial.[20] The jury was not inflamed; was instructed appro-

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[19] Ironically, the Chief Judge of the court below (who was not a member of the panel in this case) recently wrote eloquently about the injury suffered by public employees who see other employees receive benefits based on prohibited classifications. "Non-beneficiaries will feel slighted, discriminated against on the basis of factors irrelevant to their performance or character. In the end, the [state employer] will resemble more an embattled federation of race and gender-based interest groups than an institution dedicated to the unifying spirit of free and open inquiry." *Smith v. Virginia Commonwealth University*, 84 F.3d 672, 677 (4th Cir. 1996) (Wilkinson, C.J., concurring).

[20] The size of the verdict, particularly after reduction by the trial judge, was hardly "monstrous" or out of all proportion. Where the trial judge has held the verdict to be warranted by the evidence, the various courts of appeals routinely affirm judgments of the same order of magnitude seen here. *See generally Bolden v. Southeastern Pennsylvania Transportation Authority*, 21 F.3d 29 (3d Cir. 1994) (affirming trial court confirmation of $250,000 verdict for emotional distress in employment case); *Kientzy v. McDonald Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993) (affirming trial court denial of remittitur of $150,000 emotional distress verdict); *Keenan v. City of Philadelphia*, 983 F.2d 459 (3d Cir. 1992) (affirming multiple emotional distress verdicts in police sex discrimination action ranging to $220,000); *Lilley v. MTM Corp.*, 958 F.2d 746 (6th Cir. 1992) (affirming trial court confirmation of $350,000 mental anguish verdict); *Moody v. Pepsi-Cola, Inc.*, 915 F.2d 201 (6th Cir. 1990) (affirming $150,000 emotional distress verdict based on testimony that plaintiff was "shocked and humiliated"); *Wilmington v. J.I. Case Co.*, 793 F.2d 909 (8th Cir. 1986) ($400,000 in general damages in Section 1981 racial discrimination case); *Fernot v. Crafts Inn, Inc.*, 895 F. Supp. 668 (D. Vt. 1995) ($215,000 emotional distress verdict in sex harassment case). *See also Knapp*

priately; and deliberated into a third day, ultimately delivering a verdict which held for defendants on a number of issues. In the absence of any inflammatory factor or other error, the mere size of a properly-determined verdict, confirmed by the trial judge, should not be subject to attack.[21] Prior precedent from the Fourth Circuit itself made clear that "[t]he determination of damages is left to the discretion of the jury, to be reviewed by the district court in accordance with federal standards of review under Rule 50(b) and Rule 59. The award shall stand unless no substantial evidence is presented to support it, it is against the clear weight of the evidence, it is based upon evidence that is false, or it will result in a miscarriage of justice." *Barber v. Whirlpool Corp.*, 34 F.3d 1268, 1279 (4th Cir. 1994).

None of those conditions are present here. First, the compensatory damage award cannot be against the clear weight of the evidence because the defendants offered *no* evidence on this issue, and did not in any way challenge plaintiff's evidence on damages. As Judge Brinkema found, "the plaintiff's evidence on damages was wholly unrebutted. . . . The unrebutted testimony established that plaintiff has suffered *grave* emotional injury. Plaintiff's injury is compounded by the nature of her occupation. . . . In light of these facts, the verdict of the jury is hardly outrageous or monstrous." App. at 21a (emphasis added).

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v. Whitaker, 757 F.2d 827 (7th Cir. 1985) (ordering reduction in emotional distress verdict from over $500,000 to maximum of $400,000 to take account of equitable relief of which jury was not aware).

[21] At trial, Petitioner's counsel's closing argument respecting compensatory damages noted, "we only ask you to be reasonable and fair." Judge Brinkema instructed the jury not to be governed by sympathy or prejudice; to consider the amount of damages with "dispassionate common sense" and not "sympathy, speculation or guesswork;" and to award "fair compensation, no more and no less." The jury is presumed to have followed these instructions. *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).

Second, the compensatory damage award cannot be the product of erroneously admitted evidence because neither defendants nor the Court of Appeals advert to evidence on this issue which was admitted over defendants' objection (much less erroneously). Indeed, there was none.

Third, the compensatory damage award does not result in a miscarriage of justice since it was the result of a properly-instructed jury deliberating on properly-admitted evidence.[22] In this case the jury deliberated for two full days. Judge Brinkema had the opportunity to view both the plaintiff and the jury throughout the trial. Judge Brinkema made repeated, specific references on the record to the impartiality of the jury: in "the two-week context of this trial, that's the verdict that a very intelligent and, in my opinion, conscientious jury came up with;" jury "who could clearly reflect the community and who obviously listened to the evidence very carefully"; "the parties [have] gotten a fair jury evaluation of the case." The abundant evidence of emotional injury—which, again, the defendants made the decision to leave completely unrebutted—supports Judge Brinkema's conclusion that the jury was not inflamed.

Simply put, a federal appellate court has no business, consistent with the Seventh Amendment and the limited nature of review vouchsafed by this Court's decisions, in reversing on a paper record the trial judge's confirmation of a jury verdict, based in part on the trial judge's determinations of credibility and her observations of the witnesses. The opinion of the Court of Appeals discloses, at best, an independent review of the paper record according no deference to the trial judge. This is error.

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[22] *See Spell v. McDaniel*, 606 F. Supp. 1416 (E.D.N.C. 1985), *aff'd*, 852 F.2d 1380 (4th Cir. 1987). The fact that the jury deliberated a "reasonable" amount of time—in *Spell*, for two hours and 41 minutes—before returning a $900,000 compensatory damage verdict "clearly indicated a thoughtful and balanced consideration of all the elements of damages as set forth in the court's instructions." 606 F. Supp. at 1420.

II. THE ACTION OF THE COURT OF APPEALS IN VACATING THE DISTRICT COURT'S AWARD OF ATTORNEY'S FEES AND COSTS IS INCONSISTENT WITH THE LAW

A. Reversal of the Court of Appeals as to the Damages Issue Requires Reversal as to the Question of Attorney's Fees

If this Court grants Officer Hetzel's Petition and reverses the Court of Appeals' determination as to damages, the Court of Appeals' determination that Officer Hetzel "is not entitled to an award of significant, much less full, attorney's fees," Slip Op. at 8-9, App. at 8a-9a, should also be reversed. That determination is expressly premised on the Court of Appeals' view that Officer Hetzel "has gained but an insignificant portion of the relief she originally requested and . . . has failed to prevail on her most consequential claims." Slip Op. at 9, App. at 9a.[23]

B. Even if the Court of Appeals Correctly Vacated Petitioner's Damage Award, the District Court's Award of Attorney's Fees Was Correct and Should Stand

The conclusion of the appellate court that the reversal of Officer Hetzel's damage award requires that Petitioner receive "not . . . significant" attorney's fees is contrary to law.

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[23] To determine whether a plaintiff has enjoyed substantial success on her or his claim, the appropriate test is to determine whether the plaintiff has received more than nominal damages or significant other relief. The appellate court's comparison of the monetary award obtained to the amount sought in the ad damnum (usually crafted to place a ceiling on recovery, not as a guess as to the likely recovery) makes little sense. All the more so in this case, where the Court of Appeals took the ad damnum clauses for each of several independent causes of action—each arising out of a single course of injury—and added them together. A complaint demanding $1 million in damages for, for example, assault, battery, Title VII harassment, harassment unlawful under Section 1983, and intentional infliction of emotional distress, still seeks $1 million, not the $5 million the Court of Appeals' calculus would suggest.

The district court expressly found that (i) the time for which a fee award was requested was reasonably expended; (ii) the time for which an award was requested related to the claims upon which Officer Hetzel prevailed; and (iii) all of the time for which an award was requested related to a "common core of operative facts." J.A. at 24a. The district court, accordingly, awarded the lodestar amount as attorney's fees. This Court has repeatedly confirmed the "strong presumption that the lodestar figure . . . represents a reasonable fee." *Blanchard v. Bergeron*, 489 U.S. 87, 95, 109 S.Ct. 939, 945, 103 L.Ed.2d 67 (1989) (citations omitted)

Officer Hetzel prevailed, and the district court made the determination (not reversed or even controverted by the Court of Appeals) that the attorney time spent on these successful claims was of a piece with the time spent on other claims, properly applying this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The appellate court's determination to vacate that award based on a single factor—and to instruct the trial court on remand that no "significant" fee could be awarded—is contrary to this Court's admonition that the amount of damages awarded is "only one of many factors that a court should consider in calculating an award of attorney's fees." *City of Riverside v. Rivera*, 477 U.S. 561, 574, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986) (Brennan, J.).

The appellate court's sole focus on the amount of damages in vacating the fee award ignores Officer Hetzel's role as the "chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' " *Christiansburg Garment Co. v. U.S. Equal Employment Opportunity Commission*, 434 U.S. 412, 418, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (citation omitted). That only money damages were awarded in this case is not pertinent. "Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal

or relatively small damage awards." *Rivera, supra,* 477 U.S. at 574, 106 S.Ct. at 2694.

> Because damage awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief. . . . Thus, Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages.

Id., 477 U.S. at 575-76, 106 S.Ct. at 2695.[24]

The logic employed by the Court of Appeals, if left unanswered, will result in the imposition of a proportionality test for fee awards in civil rights cases. This Court has quite properly rejected such a test, as flatly inconsistent with Congressional intent. *Blanchard v. Bergeron,* 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989). Because "civil rights cases . . . frequently involve substantial expenditures of time and effort but produce only small monetary recoveries," *Rivera, supra,* 477 U.S. at 576, 106 S.Ct. at 2695, the approach used by the appellate court can only result in fewer meritorious civil rights claimants finding appropriate representation. This would stand the civil rights laws on their respective heads, resulting in "an undesirable emphasis . . . on the recovery of damages in civil rights litigation. The intention of Congress was to encourage civil rights litigation, not to create

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[24] In *Rivera,* this Court affirmed an award of attorney's fees substantially in excess of that given to Officer Hetzel (over $245,000), in a case where the federal claim damage recovery was $13,300, or about what the Court of Appeals suggests for an appropriate range in Officer Hetzel's case. The hours expended in Officer Hetzel's case were far fewer, and more sharply focused, than those of plaintiff's counsel in *Rivera*; none of the quite appropriate concerns about inefficiency and overbilling voiced by the dissenting opinion in *Rivera,* 477 U.S. at 590, 106 S.Ct. at 2702, are present in Officer Hetzel's case.

a special incentive to prove damages. . . ." *Blanchard, supra,* 489 U.S. at 95, 109 S.Ct. at 945.[25]

Civil rights cases are vehemently defended, hard to prove, and time-consuming to try. Even if the Court of Appeals properly vacated the damage award of $500,000, and even if the Court of Appeals is correct in its speculation that the proper measure of damages on remand is in the range of $10,000, it is dangerous error to hold that the lodestar amount of attorney's fees could not possibly be awarded and, indeed, that no "significant" attorney's fees would be appropriate in such a case, no matter how reasonable and extensive the time and effort expended.

III. THE ACTION OF THE COURT OF APPEALS IN IGNORING ADVERSE ACTIONS TAKEN AGAINST THE PETITIONER FOR PURPOSES OF REVIEWING THE DAMAGE AWARD IS INCONSISTENT WITH THE LAW

The Court of Appeals wrote:

> Although Hetzel claims that denial of transfers, disparate disciplinary treatment, poor performance evaluations, abusive treatment, a 1995 Internal Affairs ("I.A.") investigation, and the failure to promote are all adverse employment actions supporting the damage award, only the alleged failure to promote and the 1995 I.A. investigation can even possibly constitute adverse retaliatory action, as the other acts either were taken outside the statute of limitations or did not deprive Hetzel of a valuable government benefit.

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[25] It bears repeating that the jury, the district court, and the appellate court all agree that Officer Hetzel was retaliated against, in violation of her civil rights under the First Amendment and under Title VII of the Civil Rights Act. And the Court of Appeals' suggestion that the proper range of damages after remand would be between $9,000 and $11,000 clearly removes this from the class of cases in which only "nominal" relief of $1.00 is awarded; even the relief suggested by the appellate court is several thousand times $1.00.

Slip Op. at 4. This analysis is patently incorrect.[26] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, makes it an "unlawful employment practice" for an employer "to discriminate" against an employee who has opposed an unlawful employment practice. 42 U.S.C. § 2000e-3(a). The statute does not define the term "to discriminate" in this context, but it is precisely the same term Congress chose to use in 42 U.S.C. § 2000e-2(a)(1) of the Act, which makes it an "unlawful employment practice" to refuse to hire, or to discharge, "or otherwise to discriminate" against, any individual because of, *inter alia*, sex. The phrase "otherwise to discriminate" was, in turn, the provision of Title VII interpreted at length by this Court in *Harris v. Forklift Systems, Inc., supra.* As the Court wrote:

> Title VII of the Civil Rights Act of 1964 makes it 'an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.' 42 U.S.C. § 2000e-2(a)(1). As we made clear in [*Meritor*], this language *'is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment,' which includes requiring people to work in a discriminatorily hostile or abusive environment.*

114 S.Ct. at 370 (emphasis added) (citations omitted). This Court's interpretation of this statutory language in

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[26] While this error may or may not warrant plenary review by this Court, Petitioner assigns this error, in part, to prevent the Court of Appeals from reversing the judgment on this ground even if Petitioner is awarded review and prevails in this Court. *See, e.g., O'Connor v. Consolidated Coin Catering Corp.*, 84 F.3d 718 (4th Cir. 1996) (on remand from this Court, reversing decision of Court of Appeals in age discrimination case, Court of Appeals nevertheless affirms summary judgment for employer on alternative basis without allowing supplemental briefing or oral argument).

Harris makes clear that "whether the conduct unreasonably interferes with an employee's work performance" is *not* a prerequisite to an actionable claim. 114 S.Ct. at 372 (Scalia, J., concurring) (emphasis added).[27]

Retaliation cases should be subjected to a still less stringent standard. As a matter of law the broad sweep of conduct comprehended by *Harris* is still more narrow than conduct which may constitute actionable retaliation. The general prohibition against discrimination imposed by Title VII requires that the discrimination be "with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). This language was not included by Congress in the section of the statute prohibiting retaliation, § 2000e-3(a), arguably leading to the conclusion that retaliatory conduct need not affect compensation, terms, conditions, or privileges of employment to be actionable.[28]

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[27] Again contrary to the appellate court's speculation, the jury was instructed, properly, as to the elements of a continuing violation under this Court's decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977).

[28] Section 1983 plaintiffs are held to a similar standard. *See, e.g., Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994) ("cold shoulder," regular criticism, internal investigations sufficient to state claim for retaliation under Section 1983); *Welsh v. Derwinski*, 14 F.3d 85, 86 (1st Cir. 1996) ("many things, such as constant rudeness, conspicuous discriminatory acts, etc." may constitute adverse action); *Howze v. Virginia Polytechnic and State University*, 901 F. Supp. 1091, 1097-98 (W.D. Va. 1995) ("actions that would adversely affect one's professional reputation or ability to gain future employment, whether or not there was an ultimate employment decision" may be actionable) (emphasis added) (citations omitted). *See also Passer v. American Chemical Society*, 935 F.2d 332 (D.C. Cir. 1991) (cancellation of symposium actionable where result was humiliation among peer group); *Jensvold v. Shalala*, 829 F. Supp. 131 (D. Md. 1993) (supervisor's threats to plaintiff and refusal to name plaintiff on scientific papers actionable); *Lazic v. University of Pennsylvania*, 513 F. Supp. 761 (E.D. Pa. 1981) (deletion of positive references from personnel file).

IV. THE COURT OF APPEALS ARBITRARILY REFUSED TO REVIEW PETITIONER'S CROSS-APPEAL OF THE DISTRICT COURT'S DISMISSAL, AS A MATTER OF LAW, OF ONE OF HER SUCCESSFUL CLAIMS

The trial judge submitted to the jury the question of whether defendants retaliated against Officer Hetzel in violation of her rights under the Equal Protection Clause of the Fourteenth Amendment. Using a form of verdict based on one prepared by defendants, the jury concluded that an Equal Protection Clause violation had occurred, and assessed damages at $250,000. After trial, the district court vacated this portion of the jury's verdict, holding that no cause of action could be asserted under the Equal Protection Clause and 42 U.S.C. § 1983 based on abuse inflicted in retaliation for testifying against racial discrimination, in the absence of an independent finding of discrimination.

The district court, Officer Hetzel respectfully submits, erred in this determination of law, for two reasons: (i) the trial court granted defendants' Rule 50 motion on the Equal Protection Clause claim on a ground which was not raised at the close of plaintiff's case or at the close of all of the evidence. Only Rule 50(a)(1) motions which are properly made during trial, and which "specify the judgment sought and the law and the facts on which the moving party is entitled to judgment," Rule 50(a)(2), may be renewed after trial under Rule 50(b); and (ii) a claim of retaliation under Section 1983 and the Equal Protection Clause is viable even in the absence of underlying discrimination. Although the issue usually arises in the context of Title VII, the caselaw is settled: Failure of an underlying discrimination claim is irrelevant to the viability of the retaliation claim.[29] The reasoning and

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[29] *See generally Davis v. State University of New York*, 802 F.2d 638, 642 (2d Cir. 1986); *Kellner v. General Refractories Co.*, 631 F. Supp. 939 (N.D. Ind. 1986); *Downey v. Isaac*, 622 F. Supp.

policy purposes underlying these many cases apply with the same force to Officer Hetzel's Section 1983 retaliation claims.[39]

But that is not the point. Rather, the Court of Appeals simply declined to address this issue, at all. Under 28 U.S.C. § 1291, Officer Hetzel has a right to appeal this adverse determination.

CONCLUSION

Petitioner Janice E. Hetzel prays that this Court grant this Petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Respectfully submitted,

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October 9, 1996

1125, 1132 (D.D.C. 1985), *aff'd without opinion*, 794 F.2d 753 (D.C.Cir. 1986).

[39] There is no support in law or fact for the suggestion, made by the appellate court, that the absence of underlying discrimination in some way mitigates the suffering imposed by actual, proven retaliatory conduct. Moreover, in this case, the jury could well have concluded that discrimination and harassment did occur, but occurred outside the applicable statute of limitations, while the retaliatory conduct continued into the applicable period of time.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1935

JANICE E. HETZEL,
Plaintiff-Appellee,

v.

COUNTY OF PRINCE WILLIAM;
CHARLIE T. DEANE,
Defendants-Appellants.

and

G. W. JONES; C. E. O'SHIELDS,
Defendants.

No. 95-2004

JANICE E. HETZEL,
Plaintiff-Appellant,

v.

COUNTY OF PRINCE WILLIAM;
CHARLIE T. DEANE,
Defendants-Appellees,

and

G. W. JONES; C. E. O'SHIELDS,
Defendants.

No. 95-2010

JANICE E. HETZEL,
Plaintiff-Appellant,
v.

COUNTY OF PRINCE WILLIAM;
CHARLIE T. DEANE,
Defendants-Appellees,

and

G. W. JONES; C. E. O'SHIELDS,
Defendants.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonic M. Brinkema, District Judge.
(CA-94-919-A)

Argued: June 5, 1996
Decided: July 11, 1996

Before ERVIN, HAMILTON, and LUTTIG, Circuit Judges.

OPINION

LUTTIG, Circuit Judge:

Appellee, Janice E. Hetzel, an hispanic female who currently is a police officer in good standing in Prince William County, Virginia, brought the instant action against appellants, Prince William County and Police Chief Charlie T. Deane, as well as against other police officers not

parties to this appeal, under Title VII and section 1983 alleging harassment and discrimination on the basis of sex and national origin. Hetzel also claimed that because of her attempts to enforce her right to be free of discrimination, the defendants took various retaliatory actions, including failing to promote her to the rank of sergeant, in violation of the First Amendment, the Equal Protection Clause and Title VII. She requested some $9.3 million in damages plus backpay, retroactive promotion to sergeant, and other injunctive relief.

After an 8-day trial, the jury rejected all of Hetzel's counts (seven in all) alleging sex and national origin discrimination and that she was denied a promotion because of such discrimination, finding that the defendants had not engaged in any invidious discrimination in violation of Title VII. The jury concluded, however, that Chief Deane retaliated against Hetzel "because of [her] engaging in protected speech," and awarded $750,000 in damages for Hetzel's emotional distress. Following the verdict, the district court granted appellants' motion as a matter of law on one of Hetzel's three retaliation claims, and thus reduced the damage award to $500,000. The court also awarded appellee in excess of $180,000 in attorney's fees and costs, but, because the court was concerned that "there is a likelihood that [Hetzel] would interpret any act of discipline as retaliation," it refused to grant Hetzel any injunctive relief against future retaliation. J.A. at 291. For similar reasons, the district court denied Hetzel's request for retroactive promotion to sergeant, noting that "[a]lthough the jury may have found that the failure to promote was retaliatory, the verdict is too ambiguous to support the equitable relief requested by plaintiff. Having observed the plaintiff's demeanor at trial, the Court is concerned that plaintiff does not now possess the temperament necessary to be an effective sergeant." *Id.* at 290; *see also id.* at 291 & n.5.

Both parties appealed raising numerous issues. We leave intact the jury's finding of liability on appellee's re-

taliation claims. Because we conclude that both the damage award and the award of attorney's fees are excessive as a matter of law, however, we reverse the judgment of the district court and remand the case for further proceedings.

I.

Appellants first contend that the award of $500,000 for emotional distress, based almost entirely on Hetzel's own self-serving testimony concerning stress and headaches, is unsupported by the evidence and excessive as a matter of law. Hetzel, acknowledging that the evidence of damages comes largely from her own testimony, responds that the award is supported by the uncontroverted evidence, is similar to other awards for mental distress in comparable cases, and is easily justified by the numerous adverse actions taken by appellants. Although Hetzel claims that denial of transfers, disparate disciplinary treatment, poor performance evaluations, abusive treatment, a 1995 Internal Affairs ("I.A.") investigation, and the failure to promote are all adverse employment actions supporting the damage award, only the alleged failure to promote and the 1995 I.A. investigation can even possibly constitute adverse retaliatory action, as the other acts either were taken outside the statute of limitations or did not deprive Hetzel of a valuable government benefit, *see, e.g., Huang* v. *Board of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990).

A jury's award of compensatory damages will be set aside on the grounds of excessiveness only if " ' "the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice." ' " *Johnson* v. *Hugo's Skateway*, 974 F.2d 1408, 1414 (4th Cir. 1992) (*en banc*) (quoting *Johnson* v. *Parrish*, 827 F.2d 988, 991 (4th Cir. 1987) (quoting *Aetna Cas. & Sur. Co.* v. *Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941))), or "no substantial evidence is presented to support it," *Barber* v. *Whirlpool Corp.*, 34

F.3d 1268, 1279 (4th Cir. 1994). The district court, with little analysis, rejected appellants' claim that the $500,000 damage award for emotional distress was excessive, concluding that the award was fully supported by the evidence because "most importantly" Hetzel "was crying and shaking throughout most of the trial." J.A. at 284. Quite obviously, a litigant's demeanor while at counsel's table is not evidence to support a damage award.

The evidence presented at trial concerning Hetzel's emotional distress consisted almost exclusively of Hetzel's own, brief conclusory statements—comprising less than ten pages of a joint appendix exceeding 5,000 pages—that she had headaches, stress, trouble reading to her daughter, and problems with her family life as a result of appellants' actions. Hetzel presented no evidence corroborating the existence of any of her supposed specific harms. She remains an officer in good standing with the police department. She continues to perform her duties with no noticeable diminution in performance, as her most recent performance evaluation, which was nothing short of stellar, confirms. She has no observable injuries or physical ailments. Indeed, although Hetzel insists that she was devastated and humiliated by appellants' actions, she has never once seen a doctor, therapist, or other professional, or even sought the counsel of a friend, to help her deal with what is supposedly an enormous problem overshadowing all aspects of her life.

Hetzel's thin evidence of rather limited damages would in-and-of itself entitle her to only a minimal damage award for intangible injuries. *See, e.g., Rodgers* v. *Fisher Body Div.*, 739 F.2d 1102, 1108 (6th Cir. 1984) (holding that plaintiff's own brief testimony that he was forced to go on welfare and had his car repossessed causing humiliation and distress was insufficient to support a sizeable award for emotional distress), *cert. denied*, 470 U.S. 1054 (1985); *cf. Carey* v. *Piphus*, 435 U.S. 247, 264 (1978) ("[A]lthough mental and emotional distress . . .

is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused."). However, only a part of Hetzel's harms are properly attributed to appellants' retaliatory actions. *Much, if not all, of Hetzel's claimed distress was actually caused by her erroneous belief that she was the victim of invidious discrimination*, and of course, given the jury's findings for the defendants on all of Hetzel's claims of discrimination, Hetzel is entitled to no damages for any injuries which were caused by her belief that she was the victim of invidious discrimination. Sergeant Collier, the one witness Hetzel points to as corroborating her contention that the appellants' retaliatory actions caused her intangible injuries, testified that Hetzel had told him that she was under continuous emotional stress and feeling a "sense of frustration" because of her "dealing with this issue of *discrimination*." J.A. at 1352 (testimony of Sgt. Collier) (emphasis added). Moreover, as the district court recognized, but failed to take into account in its brief examination of the magnitude of the damages, some of Hetzel's stress and emotional difficulties must be attributed to her tendency to overreact to situations. *See id.* at 291 n.5.[1]

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[1] As the district court noted:

> [A discussion] conducted by Sergeant Metheny on February 24, 1995 provides a clear example of the risk of plaintiff's overreaction. The [discussion] was designed to explore plaintiff's understanding of the Miranda warning and to eliminate any confusion plaintiff may have had about the requirements for a proper waiver. . . . Despite Sergeant Metheny's assurance that she would not be disciplined for [a] 1993 case, and before he could question her about it, plaintiff responded that "[i]f you're going to get into this, I refuse to answer any questions right now and I'm going to walk out of here because this is complete harassment." Even First Sergeant Collier, plaintiff's supervisor and strongest supporting witness, felt that plaintiff overreacted to the [discussion].

Id. (internal citations omitted).

The only other evidence of emotional distress that even arguably supports an award of damages is Hetzel's reaction following a fifteen-to-twenty minute internal Affairs interview, conducted on January 15, 1995, concerning whether Hetzel had improperly advised a suspect of his *Miranda* rights—an investigation which led to an oral reprimand for Hetzel's improper actions. While we have significant doubts as to whether this interview constitutes an adverse employment action which is actionable under Title VII or section 1983, we do not here need to conclusively decide that issue because any temporary reaction Hetzel may have had to this interview does not entitle her to any substantial or significant damage award. Although other officers testified that Hetzel was briefly distraught following the interview, Hetzel, after composing herself, finished out the remainder of her shift. Plainly a $500,000 award for a reaction following a brief interview during the course of a successful investigation is a gross miscarriage of justice.

Simply put, the jury was presented with insufficient evidence "to place a high dollar value on plaintiff's emotional harm." *Rodgers*, 739 F.2d at 1108. That this award is outrageous is confirmed by even a cursory analysis of the impressive array of cases cited by the appellee in support of the jury verdict. These cases, all of which contained a substantial award of $25,000 or more for intangible injuries such as emotional distress, involved plaintiffs that either were the victims of invidious discrimination, suffered serious—often permanent—physical injuries, or were discharged and had difficulty finding alternative employment. *See* Appellee's Br. at 32-34 & n.29. For example, in *Meyers* v. *City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir.1994), the Sixth Circuit rejected the contention that an award of $25,000 for mental anguish, humiliation and loss of reputation to an assistant fire chief unconstitutionally forced to retire was excessive and not supported by the evidence because the fire chief, *who had been discharged*, had lost ten pounds, suffered from in-

somnia, and was under a doctor's care for stomach problems. In another case bearing some similarity to the instant case, *Wulf* v. *City of Wichita,* 883 F.2d 842, 874-75 (10th Cir. 1989), the court held that a $250,000 award for emotional distress to a police officer *following unlawful termination,* which was supported only by the testimony of the plaintiff that he was stressed, angry, depressed and frustrated, and similar testimony from his wife, was grossly excessive and remanded the case for recalculation of damages not to exceed $50,000. In stark contrast to these cases, and the others relied upon by the appellee—most of which did not involve an award of damages for emotional distress even approaching the magnitude of the award in this case—Hetzel suffered no discrimination, was not physically injured, is not under the care of a physician, and remains an officer in good standing on the Prince William County police force. *See also Spence* v. *Board of Educ.*, 806 F.2d 1198, 1200-01 (3d Cir. 1986) (affirming district court's remittitur of jury award of $22,060 for emotional distress where plaintiff testified that she was "depressed and humiliated" by a retaliatory transfer).

As this court has often remarked, "an award of substantial compensatory damages . . . must be proportional to the actual injury incurred. . . . The award must focus on the real injury sustained . . . ." *Piver* v. *Pender County Bd. of Educ.*, 835 F.2d 1076, 1082 (4th Cir. 1987), *cert. denied,* 487 U.S. 1206 (1988). Here, the award of $500,000 was grossly excessive when compared to the limited evidence of harm presented at trial and would result in a serious "miscarriage of justice" if upheld. Accordingly, we set aside the damage award and remand the case to the district court for recalculation of the award of damages for emotional distress.[2] Upon remand,

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[2] Because we conclude that the $500,000 award is outrageous, we do not need to address Hetzel's contention that the district court improperly reduced the award by $250,000 in granting a judgment as a matter of law for the defendants on one of her retaliation claims.

the district should closely examine the awards in *Bradley* v. *Carydale Enter.*, 730 F. Supp. 709, 726-27 (E.D. Va. 1989), and *McClam* v. *City of Norfolk Police Dep't*, 877 F. Supp. 277, 284 (E.D. Va. 1995), which we believe are comparable to what would be an appropriate award in this case.

II.

Appellants also contend that the district court erred in granting appellee's entire $176,293 request for attorney's fees. The district court, after concluding that the unsuccessful discrimination and harassment claims against all defendants—two of which are not even a party to this appeal because they fully prevailed—"shared a common core of operative facts" with the successful retaliation claims against the city and Chief Deane, and that Hetzel had achieved significant relief in the form of a "substantial damage[]" award, granted appellee's full petition for attorney's fees. J.A. at 288-89. We will reverse a district court's determination of attorney's fees only "if under all the facts and circumstances [the award] is clearly wrong." *Hugo's Skateway*, 974 F.2d at 1418 (internal quotation marks omitted).

Especially in light of our determination that the evidence does not support a substantial damage award, we believe the award of $176,293 in attorney's fees was "clearly wrong." Given the limited results she obtained in this case, Hetzel is not entitled to an award of significant, much less full, attorney's fees. As the Supreme Court has instructed, " '[w]here recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.' " *Farrar* v. *Hobby*, 506 U.S. 103, 114 (1992) (quoting *Riverside* v. *Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in the judgment)). Whereas Hetzel's complaint requested $9.3 million in damages, back pay, retroactive promotion to sergeant,

and other injunctive relief, she will ultimately receive only a pittance of her original damages request and no injunction relief, promotion nor back pay. Moreover, the Supreme Court has also explained that,

> [w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. . . . We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. *A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.*

Hensley v. *Eckerhart*, 461 U.S. 424, 435, 439-40 (1983) (emphasis added); *see also Farrar*, 506 U.S. at 114 ("Indeed, 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.' " (quoting *Hensley*, 461 U.S. at 436)). Here, Hetzel failed on her core claims—the seven counts alleging invidious sex and national origin discrimination. Because Hetzel has gained but an insignificant portion of the relief she originally requested and because she has failed to prevail on her most consequential claims, she is entitled only to a fraction of her attorney's fees.

In sum, we vacate the fee award and remand to the district court for reconsideration of appellee's fee petition.

III.

Finally, we consider appellee's cross-appeal. Hetzel claims that because she prevailed on her retaliation claim she is "presumptively" entitled to equitable relief in the form of front and backpay, or retroactive promotion to sergeant, and that the district court abused its discretion in refusing to award any such relief. We disagree. With respect to backpay, the evidence clearly showed that Hetzel earned more as a police officer than she would have earned as a sergeant because officers, but not sergeants, are paid overtime. With respect to a promotion or front pay, the district court determined:

> Although the jury may have found that the failure to promote was retaliatory, the verdict is too ambiguous to support the equitable relief requested by plaintiff. Having observed the plaintiff's demeanor at trial, the Court is concerned that plaintiff does not now possess the temperament necessary to be an effective sergeant.

J.A. at 290. We can find nothing in the voluminous record in this case that even suggests that the district court abused its discretion, and we will not order that someone be promoted to a higher level within a paramilitary organization where they lack the requisite qualities to perform the duties of the job effectively.[5]

For the reasons stated herein, we reverse the judgment of the district court and remand the case for recalculation of damages for emotional distress and recalculation of attorney's fees.

REVERSED AND REMANDED

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[5] Both parties raise numerous other issues. We have carefully considered each issue and have concluded that the remaining claims either have not been properly preserved for appeal or are without merit.

APPENDIX B

[Filed Apr. 5, 1995]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 94-919-A

JANICE E. HETZEL,
Plaintiff,

v.

COUNTY OF PRINCE WILLIAM, *et al.*,
Defendants.

MEMORANDUM OPNION

This case comes before the Court of post-trial motions, including Plaintiff's Petition for Back Pay and Injunctive Relief, Plaintiff's Motion for Award of Attorney's Fees, Defendants' Motion for Judgment as a Matter of Law, or, in the Alternative, Motion to Set Aside Verdict, Motion to Amend Judgment, or Motion for New Trial, Pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure. and Defendants' Motion for Attorneys Fees and Costs.

Plaintiff is a police officer employed by the County of Prince William and is a Hispanic woman. Plaintiff brought this lawsuit under Title VII and Section 1983, alleging harassment and discrimination on the basis of her sex and national origin and retaliation for complaining about discrimination and harassment. The complaint alleged seven counts of discrimination and three counts of retaliation against three defendants, Sergeant Jones, Captain O'Shields, and the County through the actions of

Chief Deane. The case was tried to a jury on January 23 through February 3, 1995. After two full days of deliberations, the jury returned a verdict for plaintiff and against the County on the retaliation counts of the Complaint, Counts III, VI, and X. These counts advanced the plaintiff's claim of retaliation by the County under three separate theories. Count III alleged that the County, through the actions of Chief Deane, retaliated against plaintiff in violation of Title VII. Counts VI and X alleged that the County, through the actions of Chief Deane, retaliated against plaintiff in violation of Section 1983, under the Equal Protection clause of the Fourteenth Amendment and under the First Amendment of the Constitution, respectively. The jury found in favor of the individual defendants, Jones and O'Shields, on all counts against them. The parties timely filed their post trial motions.

I. *Defendants' Motion for Judgment as a Matter of Law, or, in the Alternative, Motion to Set Aside Verdict, Motion to Amend Judgment, or Motion for New Trial, Pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure*

Defendants advance this motion on numerous grounds. We will address each of the issues raised by defendants' motion separately.

Count VI: Retaliation in Violation of the Equal Protection Clause

Defendants contend that they are entitled to judgment as a matter of law on this count because the Equal Protection clause cannot support a claim of retaliation absent some discrimination. The Fourth Circuit has indicated its support of defendants' theory. *See Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994). In *Beardsley*, the court found that the plaintiff could sustain a claim of retaliation under the Fourteenth Amendment where she alleged retaliation in the form of continued discrimination. The court noted, however, that "[a] violation of the First

Amendment's protection of the right to speak out is a necessary predicate to a claim of pure retaliation in the context of adverse employment action after the claimant has voiced a grievance." *Id.* (citing *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989) (holding that in order to maintain an equal protection claim, plaintiff must show that defendants intentionally discriminated against her because of her membership in a particular class)).

Unlike the plaintiff in *Beardsley*, plaintiff here prevailed on a pure retaliation claim. The jury found that defendants did not engage in any acts of discrimination or harassment within the statute of limitations.[1] Because the jury found that no acts of discrimination or harassment occurred within the statutory period, the jury's finding of retaliation must be construed as a finding of retaliation independent of any discriminatory motive. Following the *Beardsley* decision, plaintiff could not as a matter of law sustain her claim of retaliation under the Equal Protection clause. Accordingly, defendants' Motion for Judgment as a Matter of Law is granted as to Count VI.

Count X: Retaliation in Violation of the First Amendment

Defendants argue that plaintiff did not engage in speech protected by the First Amendment. Additionally, defend-

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[1] The verdict form submitted to the jury elicited a verdict on each count and as to each defendant separately. Because Title VII and Section 1983 have different statutes of limitations, the jury was specifically given the appropriate date and asked whether they found that the particular defendant engaged in any prohibited act after that date. The Court acknowledges that the jury's findings for the defendants mean only that plaintiff suffered no discrimination or harassment within the statute of limitations period, and does not mean that the plaintiff never suffered discrimination or harassment. However, because the statutes of limitations were the same for the retaliation claims as for the discrimination and harassment claims, a finding that no discrimination or harassment occurred within the statutory period means that the jury found that plaintiff had suffered pure retaliation.

ants argue that even if plaintiff did engage in protected speech, she failed to prove any causal connection between that speech and defendants' actions.

As a public employee, plaintiff enjoys only limited free speech rights. A public employee's speech is protected only when it is regarding a "matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146 (1982). If the speech involves a matter of public concern, the employer cannot constitutionally discourage or penalize the speaker, unless the disruption caused to the employer's office, including the effects of the speech upon office morale and employee performance, outweigh the speaker's interest in exercising his or her constitutional rights. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). The question of whether the employee's speech is protected is a legal question for the court. Accordingly, the jury in this case was instructed that the court had determined as a matter of law that plaintiff had engaged in protected speech.

Defendants argue that the filing of plaintiff's EEOC complaint and lawsuit did not involve matters of public concern. In determining whether a statement involved a matter of public concern, the court must consider the content, form, and context of the statement. *Rankin v. McPherson*, 483 U.S. 378, 385 (1987). In this case, both the content and context of plaintiff's complaints support a finding that this is a matter of public concern. Although the Fourth Circuit has indicated that the content of the speech is more important than the context, *Jackson v. Bair*, 851 F.2d 714, 720 (4th Cir. 1988), it must be noted that plaintiff brought both of her complaints against the defendants in decidedly public forums.

In examining the content of an employee's complaint, the court's "focus is therefore upon whether the 'public' or the 'community' is likely to be truly concerned with or interested in the particular expression or whether it is more properly viewed as essentially a 'private' matter be-

tween employer and employee." *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076, 1079-80 (4th Cir. 1987) (quoting *Berger v. Battaglia*, 779 F.2d 992, 998-99 (4th Cir. 1985)). Because plaintiff's EEOC complaint alleged that she and other women and minorities in the department suffered from a hostile environment, it cannot be considered a private matter between plaintiff and her employer. Rather, an allegation of widespread discrimination within a police department is clearly a matter with which the public would be concerned. Similarly, plaintiff's complaint implicated the practices and customs of the police department and its high ranking officers, thereby raising concerns not merely personal to plaintiff. Proof of the allegations in plaintiff's complaint necessarily included evidence of discrimination against other minorities in the department. Finally, the number of reporters present throughout trial and the interest with which this case was followed in the press demonstrate that matters of public concern were involved.

Defendants next argue that plaintiff produced no evidence of a causal connection between her protected acts and the adverse actions taken against her. This argument is also asserted against Count III, and is addressed below.

Count III: Retaliation Under Title VII

Defendants attack the verdict on this count on three grounds. Defendants argue that plaintiff did not engage in any protected activity, did not suffer any legally cognizable adverse employment action, and did not prove a causal connection between a protected activity and an adverse employment action.

Title VII prohibits retaliation against an employee "because [s]he has opposed any practice made an unlawful employment practice by this subchapter, or because [s]he has made a charge, testified, assisted or participated in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Therefore, the only

activities protected by Title VII are the filing of an EEOC charge or a lawsuit, and the opposing of an "unlawful employment practice." Defendants concede that plaintiff's filing of a charge with the EEOC and pursuit of this litigation comprise activities protected by Title VII. Defendants deny that plaintiff's participation in a 1989 Internal Affairs investigation regarding the use of racial epithets in the department was a protected activity.

We must begin by laying to rest defendants' characterization of the 1989 Internal Affairs investigation. Defendants have repeatedly denied that the 1989 investigation concerned racism in the department. Rather, defendants assert that the investigation examined the use of racial epithets by individual officers. While defendants are correct that the investigation was nominally an inquiry into the use of racially offensive language, the Court rejects defendants' claim that the use of such language is not racism. Obviously, the use of racially offensive language connotes the speakers' attitudes towards minorities. *See Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1133 (4th Cir. 1988) (holding that district court improperly excluded evidence of use of racial slurs because use of such language is relevant to racial animus). In addition, the use of racial slurs has a disturbing impact on the listener. When used by coworkers, racially offensive language can create a hostile environment, an unlawful employment practice under Title VII. *See Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 234, 238 (5th Cir. 1971) (holding that Title VII prohibits "the practice of creating a working environment heavily charged with ethnic or racial discrimination"); *cf. Katz v. Dole*, 709 F.2d 251, 254-56 (4th Cir. 1983) (finding that "extremely vulgar and offensive sexually related epithets" created hostile environment and therefore constituted sexual harassment). Whether the use of epithets in the department in 1989 rose to the level of a hostile environment is not before this Court. However, such language

was clearly present enough to warrant an investigation and, thereafter, a department-wide memorandum addressing the problem, rather than mere action against individual offenders. Therefore, the Court finds that by participating in the 1989 Internal Affairs investigation, plaintiff "opposed" an unlawful employment practice. Accordingly, her participation in the 1989 investigation was a protected activity under Title VII.

Defendants also argue that the acts complained of by plaintiff were not legally cognizable "adverse employment actions." In support of this position, defendants rely on the Fourth Circuit's opinion in *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981). In *Page*, the court held that the composition of a promotions review panel was not an adverse employment action. In so holding, the court noted that "there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of [Title VII]." *Id.* at 233. Unlike the actions complained of by the plaintiff in *Page*, most of the employment actions of which plaintiff complained had an "immediate effect" on plaintiff's employment conditions. As defendants concede, the failure to promote plaintiff clearly falls into this category. Similarly, denial of transfer, disparate disciplinary treatment, abusive treatment, and the January 15, 1995 Internal Affairs investigation had an immediate effect on plaintiff's employment conditions.

Defendants object most strenuously to the Court's decision to allow the jury to consider the January 15, 1995 Internal Affairs investigation as an adverse employment action, arguing that the incipient investigation was no more than an interview and emphasizing that no charges had yet been brought against plaintiff.[2] However, it is clear

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[2] Shortly after the close of trial, the Department resumed its investigation and charged the plaintiff with two violations of the General Orders.

that even in its initial stages, an Internal Affairs investigation clouds an officer's reputation and record and can thereby affect the conditions of the officer's employment. Under the circumstances of this case, with the initiation of the investigation coming one week before trial, it is clear that the investigation had an immediate and adverse impact on plaintiff's employment. Trial witnesses, including plaintiff, Master Police Officer Barr, and First Sergeant Collier testified that the January 15, 1995 Internal Affairs investigation caused plaintiff to become hysterical and interfered with her ability to perform her duties. More importantly, First Sergeant Collier testified that the investigation was enough to put someone, not just plaintiff, "over the edge," and that he felt intimidated by it.[3]

Defendants argue that plaintiff produced no evidence of a causal connection between her protected activity and the adverse actions taken against her. This is simply incorrect. Plaintiff produced substantial indirect evidence of causation.

Defendants' argument that the jury's finding for the defendants on the discrimination/failure to promote counts precludes a finding of retaliation is also ill-founded. Defendants argue that because the jury found no discrimination, plaintiff did not sustain her burden of proving that the defendants' proffered legitimate reasons were pretextual. However, the plaintiff's burden was more than merely proving that the proffered reason was pretext; plain-

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[3] First Sergeant Collier is plaintiff's current immediate supervisor and testified under subpoena in plaintiff's case in chief. First Sergeant Collier was an extremely credible witness who testified that he thought he was a defense witness when he was deposed in October, 1994. He was later surprised to learn that he was on plaintiff's witness list.

With regard to the January 15, 1995 Internal Affairs investigation, First Sergeant Collier testified that he was suspicious of the timing of the investigation. He also stated that he felt intimidated by the investigation and thought that his interview was meant to dissuade him from testifying in favor of the plaintiff.

tiff's burden was to show that the proffered reason was pretext and that the real reason was to discriminate or retaliate. Obviously, the jury could have found that plaintiff failed to sustain her burden on the discrimination counts but succeeded on the retaliation counts. The jury would merely have had to find that the plaintiff proved that the defendants' proffered reason was false and that the real reason was retaliatory, not discriminatory.

New Trial

Defendants seek a new trial, arguing that there was no evidence of retaliation or of damages. As discussed above, there was clearly sufficient indirect evidence of retaliation upon which the jury could have based its verdict. Similarly, defendants' claim that there was no evidence of damages is patently without merit.

Defendants argue that plaintiff produced no evidence of emotional distress related to any of the alleged acts of retaliation nor proved that she suffered any permanent or lasting effects from the emotional pain. However, plaintiff testified at length as to the emotional distress she has suffered as a result of the adverse actions of which she complained. Plaintiff testified that she suffers severe headaches, stress, and interference with her family life. First Sergeant Collier, Master Police Officer Barr, and Officer Wing testified that plaintiff was "devastated" by the January 15, 1995 Internal Affairs investigation and was hysterical afterwards. These witnesses also testified that they had never seen plaintiff cry before that night. Significantly, First Sergeant Collier advised plaintiff to take off the week after the interview because she was so upset and distracted. Perhaps most importantly, the jury was able to observe the plaintiff and could see that she was crying and shaking throughout most of the trial. The evidence of plaintiff's emotional distress was entirely unrebutted.

Defendants also seek a new trial, or remittur, based on the argument that the verdict was excessive. A compensa-

tory damage award "will not be set aside on grounds of excessiveness unless it is against the clear weight of the evidence, is the product of erroneously admitted evidence, or will result in a miscarriage of justice. . . . An assessment of damages is excessive in civil rights actions only when it is 'outrageous' or 'monstrous.' " *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1347 (4th Cir. 1991) (citation omitted).

As discussed above, the plaintiff's evidence on damages was wholly unrebutted. Therefore, the weight of the evidence clearly favored the award. The unrebutted testimony established that plaintiff has suffered grave emotional injury. Plaintiff's injury is compounded by the nature of her occupation. A police officer's safety may be endangered if she is performing her duties while under severe emotional distress. She has also suffered humiliation as a result of breaking down before her colleagues. Plaintiff testified that she was ashamed that her squad members knew she was crying hysterically in the bathroom after the January 15, 1995 Internal Affairs interview. In light of these facts, the verdict of the jury is hardly outrageous or monstrous.

Although the Court does not find the award excessive, it does reduce the award to $500,000 because the Court has found in defendants' favor on Count VI. Count VI was submitted to the jury and the jury awarded $250,000 on that count. Although the jury was polled about the damage amount and indicated that it intended to award $750,000 total, it would be pure conjecture for the Court to assume that the jury would have reached the same total if only two counts had been submitted to it. The Court is unwilling to now reassign the jury's award to the other retaliation counts. Therefore, because the Court is granting Defendants' Motion for Judgment as a Matter of Law as to Count VI, plaintiff's award on that count must be set aside.

Defendants argue that the verdict was rendered on the basis of improperly admitted evidence and the inflammatory arguments of counsel. During closing arguments, plaintiff counsel made several statements to which defendants now object. However, as the transcript reflects, defense counsel did not object to these statements during the arguments themselves. In addition, the challenged arguments were within the scope of allowable arguments and were supported by the evidence.[4]

Defendants challenge the admission of evidence of the January 15, 1995 Internal Affairs investigation. As discussed above, defendants' arguments that the January 1995 Internal Affairs investigation was not an adverse action fail. Also without merit is defendants' contention that plaintiff improperly bolstered her retaliation argument. Plaintiff was allowed to present evidence that the complaint against her was without merit. Defendants argue that the evidence adduced at trial was not known to them when they decided to initiate the investigation. However, this point strengthens, rather than undermines, the decision to admit evidence of the investigation. Evidence showing that defendants initiated an investigation based on such scant information during the week before trial was clearly admissible as probative of the claim of retaliation.

As for the testimony of Debbie Barlow, Marvin Scott, and Sindi Leo, and the testimony regarding the INS investigation, this evidence was properly admitted. In support of her national origin and sex discrimination claims, plaintiff was properly allowed to put on evidence of hos-

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[4] For example, defendants complain that plaintiff's counsel argued that Chief Deane "hated" plaintiff. While the Chief did not state that he hated plaintiff, he did testify that he would "not easily forget" the difficulties he had with her. The jury could evaluate Chief Deane's demeanor and infer from this statement that he felt hostile towards plaintiff. Thus, while counsel's argument was perhaps exaggeration, it was not unsupported by the evidence.

tility within the department towards Hispanics, other minorities, and women. The INS investigation and the testimony of the challenged witnesses fall within this category.

Defendants complain about the verdict form submitted to the jury and argue that the form allowed the jury to award duplicative damages. It must be noted that defendants were given the opportunity to object to the verdict form before its submission to the jury and that they did not oppose it on these grounds. In addition, the verdict form was largely modeled after defendants' own proposed form. After the verdict was returned, the Court polled the jury and the unanimous intention was to award the sum of $750,000. It is the Court's belief that the award would have been the same regardless of the number of blanks on the verdict form. Rather than causing a duplicative award, the structure of the verdict form only resulted in the jury dividing the total award into thirds.

As for the Court's failure to instruct the jury to exclude front pay from its award, this oversight clearly had no bearing on the jury's verdict. The Court properly instructed the jury not to consider back pay and to award compensatory damages for "pain, suffering, or mental anguish." There was almost no evidence of salary damages and the issue was barely mentioned in closing arguments. Therefore, although the jury was not specifically instructed to exclude front pay from its considerations, such an instruction was unnecessary.

Defendants also challenge the Court's instruction on the mixed motive defense as erroneous. While the defendants may be correct that the instruction on the mixed motive defense was incomplete, the deficiency favored the defendants in this case. Therefore, defendants' arguments based on the instructions to the jury cannot support the motion for new trial.

II. Defendants' Motion for Attorneys Fees and Costs

It is well settled that defendants in civil rights actions are entitled to attorneys fees and costs as prevailing parties only when the plaintiff's action was frivolous, unreasonable, or without foundation. *Hughes v. Rowe*, 101 S. Ct. 173, 178 (1980) (citing *Christianburg Garment Co. v. EEOC*, 98 S. Ct. 694 (1978)). Such is clearly not the case here. Although not successful on all counts, plaintiff did prevail on three (now reduced to two) counts and was awarded substantial damages. Such an outcome clearly shows that the lawsuit was by no means frivolous.

III. Plaintiff's Motion for Award of Attorney's Fees

Plaintiff seeks a total of $176,293 in attorney's fees, representing 1,384.8 hours of work (854.6 hours of attorney time and 530.2 hours of paralegal time). Plaintiff is clearly the prevailing party in this action. Although not entirely victorious, plaintiff succeeded on a "significant issue in litigation which achieved some of the benefit [she] sought in bringing suit." *Texas State Teachers v. Garland Independent School District*, 109 S. Ct. 1486, 1493 (1989).

In determining a reasonable fee where a prevailing plaintiff has succeeded on only some of her claims, the court must consider whether the unsuccessful claims were related to the successful ones and whether the number of hours expended was reasonable to achieve the overall level of success. *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1940 (1983). In this case, both factors favor an award of full fees. All of plaintiff's claims shared a common core of operative facts and therefore the successful and unsuccessful claims were inextricably related. In addition, the number of hours devoted to this case by plaintiff's counsel are fully reasonable in light of the results obtained. As stated in open court on March 10, 1995, the Court has also considered the factors enumerated in *Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir.), *cert.*

denied, 439 U.S. 934 (1978) and finds that an award of full attorney's fees is justified.

Plaintiff also seeks an award of non-taxable costs in the amount of $11,453.26. Plaintiff's request is unsupported by any documentation of these costs and therefore cannot be granted. In addition, some of the non-taxable costs requested by plaintiff appear to be excessive, such as $1,389 for "facsimile charges." Therefore, this request is denied.

IV. Plaintiff's Bill of Costs

The Court has examined plaintiff's bill of costs in which she seeks $7,556.93, and finds that defendants' objections are unwarranted. In particular, the costs claimed for deposition transcripts are recoverable because the depositions were reasonably necessary for preparation for trial and because they were used at the summary judgment hearing, although not used at trial. *See Lavay Corp. v. Dominion Fed. Sav. & Loan Ass'n*, 830 F.2d 522, 528 (4th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988); Guidelines for the taxation of costs in the United States District Court for the Eastern District of Virginia, Norfolk Division (January 1, 1994) § 8(d) ("costs of the original transcript of a discovery deposition may be included in the taxable costs only if the prevailing party has made use of the deposition during the trial or a hearing").

V. Plaintiff's Petition for Back Pay and Injunctive Relief

Plaintiff seeks equitable relief in the form of back pay, promotion to sergeant or front pay equivalent to five years' salary, and an injunction enjoining defendants from further retaliating against her. The Court cannot grant plaintiff's motion with regard to the position of sergeant. The jury found that defendants' failure to promote plaintiff to sergeant was not motivated by discriminatory intent. Although the jury may have found that the failure to pro-

mote was retaliatory, the verdict is too ambiguous to support the equitable relief requested by plaintiff. Having observed the plaintiff's demeanor at trial, the Court is concerned that plaintiff does not now possess the temperament necessary to be an effective sergeant. In keeping with the Court's observations of plaintiff's demeanor and in light of the ambiguity of the verdict, the plaintiff's request for back pay and promotion to sergeant, or five years' front pay, is denied.

The Court is also denying plaintiff's request for an injunction prohibiting defendants from further retaliating against her. Given plaintiff's current emotional condition and great sensitivity, there is a likelihood that she would interpret any act of discipline as retaliation.[5] The Court

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[5] An interview conducted by Sergeant Metheny on February 24, 1995 provides a clear example of the risk of plaintiff's overreaction. The interview was designed to explore plaintiff's understanding of the Miranda warning and to eliminate any confusion plaintiff may have had about the requirements for a proper waiver. To that end, Sergeant Metheny attempted to ask plaintiff about the waiver that was the subject of the January 15, 1995 Internal Affairs interview as well as a waiver that plaintiff obtained in June, 1993. Before showing plaintiff the report from the 1993 case, Sergeant Metheny explicitly stated that "I wanna make sure that you understand right now that this report that I'm giving you . . . is not something that . . . will result in any disciplinary action at all. I wanna make sure that you understand that." Interview Transcript at 8. Despite Sergeant Metheny's assurance that she would not be disciplined for the 1993 case, and before he could question her about it, plaintiff responded that "[i]f you're going to get into this, I refuse to answer any questions right now and I'm going to walk out of here because this is complete harassment." *Id.* at 10. Even First Sergeant Collier, plaintiff's supervisor and strongest supporting witness, felt that plaintiff overreacted to the interview. After observing part of the interview, First Sergeant Collier told plaintiff,

> [t]his is not a trial. Listen to me, okay? Sergeant Metheny is trying to conduct an investigation. I don't know into what yet, okay? We need to listen to him and you can answer his questions . . . [or] we can sit here and banter back and forth like a cheap Perry Mason novel all night long and not ever get to the bottom of this and I would like to get this resolved

is unwilling to issue an injunction that might be used to improperly interfere with the legitimate personnel decisions of the Prince William County Police Department. The jury's finding of retaliation and substantial award should be sufficient to serve as a deterrent and prevent any future retaliation.

Conclusion

For the reasons discussed above, Defendants' Motion for Judgment as a Matter of Law, or in the Alternative, Motion to Set Aside Verdict, Motion to Amend Judgment, or Motion for New Trial, Pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure is DENIED IN PART AND GRANTED IN PART, as reflected in the accompanying Order issued this day.

Defendants' Motion for Attorneys Fees and Costs is DENIED. Plaintiff's Motion for Award of Attorney's Fees is GRANTED and plaintiff is awarded her full attorney's fees in the amount of $176,293. Plaintiff's request for non-taxable costs is DENIED. Plaintiff's Bill of Costs is GRANTED, therefore, plaintiff is awarded the full $7,556.93.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record.

Entered this 5th day of April, 1995.

/s/ Leonie M. Brinkema
LEONIE M. BRINKEMA
United States District Judge

Alexandria, Virginia

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and I do have a district to run out here and I'm trying desperately to do that so we need to get to the bottom of what's going on here . . . and you need to cooperate to some extent to see that that's done.

Id. at 15.

[Filed Apr. 5, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 94-919-A

JANICE E. HETZEL,
Plaintiff,

v.

COUNTY OF PRINCE WILLIAM, *et al.*,
Defendants.

ORDER

For the reasons stated in open court as amplified in the accompanying Memorandum Opinion, defendants' Motion for Judgment as a Matter of Law is GRANTED as to Count VI and DENIED in all other respects. Defendants' alternative Motions to Set Aside Verdict and for a New Trial are DENIED. Defendants' alternative Motion to Amend Judgment is GRANTED as to Count VI and it is hereby

ORDERED that the Judgment be amended to show judgment in favor of defendants on Count VI. This ruling reduces the plaintiff's recovery to $500,000. In all other respects the Motion is DENIED,

Plaintiff's petition for Back Pay and Injunctive Relief is DENIED. Plaintiff's Motion for Award of Attorney's Fees is GRANTED and it is hereby

ORDERED that defendants pay $176,293 in attorney's fees, plus $7,556.93 for plaintiff's bill of costs. The Court

denies plaintiff's request for $11,453.26 in non-taxable costs.

The Clerk is directed to forward copies of this Order and Memorandum Opinion to counsel of record.

Entered this 5th day of April, 1995.

/s/ Leonie M. Brinkema
LEONIE M. BRINKEMA
United States District Judge

APPENDIX C

CONSTITUTIONAL PROVISIONS

[AMENDMENT I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

[AMENDMENT VII]

[Trial by Jury in Civil Cases]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

[AMENDMENT XIX]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

[*Apportionment of Representatives in Congress*]

Representatives shall be apportioned among the several states according to their respective number counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

[*Persons Disqualified from Holding Office*]

No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each house, remove such disability.

Section 4.

[*What Public Debts Are Valid*]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment

of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

[*Power to Enforce This Article*]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY PROVISIONS

42 USC § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory *or the District of Columbia*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(2)

No. 96-574

Supreme Court, U.S.
FILED
NOV 8 1996
CLERK

In The Supreme Court Of The United States

OCTOBER TERM 1996

JANICE E. HETZEL,

Petitioner,

v.

COUNTY OF PRINCE WILLIAM AND CHARLIE T. DEANE,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant a writ of certiorari to a petitioner who told the Fourth Circuit Court of Appeals to overturn the jury award she received if it found that award "a miscarriage of justice," based on her new argument that the standard she urged on the Court of Appeals is really inappropriate under the Seventh Amendment?

2. Should a writ of certiorari be granted to review a Court of Appeals decision that the Petitioner, who is entitled to only a "pittance" of the recovery she sought in this case, is not entitled to a full award of $176,293 in attorneys' fees?

3. Should this Court expend its limited time and resources reviewing a Court of Appeals decision that the Petitioner is not entitled to damages for alleged acts which either did not amount to legal wrongs or which occurred outside all statutes of limitation applicable to her claims?

4. Should this Court review a Court of Appeals decision declining to address an issue it found made no difference to the outcome of this particular case simply because it made that finding summarily?

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BRIEF OF RESPONDENTS PRINCE WILLIAM COUNTY AND CHARLIE T. DEANE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents ask the Court to deny the Petition For a Writ of Certiorari, which seeks review of an opinion by the United States Court of Appeals for the Fourth Circuit. For the convenience of the Court, all citations to the Court of Appeals opinion and trial court opinion of the United States District Court for the Eastern District of Virginia, will be to the Appendix of the Petition, where both have been included.

STATEMENT OF THE CASE

Contrary to Petitioner's assertions, this case does not present any important question concerning the proof or quantum of emotional distress damages or the award of attorneys' fees in civil rights cases which has not already been addressed by this Court. This Court's decisions were applied appropriately by the Fourth Circuit. Further, even if the questions Petitioner raises were unresolved by this Court, the questions which are central to the Petition, on the Seventh Amendment and the propriety of the attorneys' fee award, are not properly before the Court in this case either because they were never raised below or are not now ripe for decision.

As the Petition states, this was a civil rights action brought by Petitioner, Officer Janice Hetzel, against the Respondent County, the Respondent Police Chief, and two of her superior officers.[1] At the heart of this case, as it was filed and tried in the Eastern District of Virginia, were her empty

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[1] The jury completely absolved the latter two officers.

allegations of sex and national origin discrimination and harassment. In 10 counts, Officer Hetzel claimed a total of $9.3 million in damages, requested an immediate promotion with an award of back pay and front pay, and sought an injunction against the Police Department. The jury found that there had been no discrimination or harassment and ruled for the Defendants on seven out of ten counts. It found against the County and the Chief on three counts of retaliation, awarding $750,000. On the Defendants' Rule 50 motion, the district judge vacated the verdict and the award for the count of pure retaliation under the Fourteenth Amendment, because no such cause of action exists. The trial court denied the balance of Defendants' Rule 50 and all of the Rule 59 motion and confirmed the verdict on the other two counts for a total award of $500,000. The trial court also awarded the full $176,293 in attorneys' fees Officer Hetzel claimed. Both parties appealed the trial court decision to the Fourth Circuit, which, in an opinion by a unanimous panel, reversed and remanded the case on the damages and attorneys' fees issues. Officer Hetzel sought no *en banc* rehearing from the Fourth Circuit, filing this Petition instead.

This Petition is Officer Hetzel's latest attempt to force the Board of County Supervisors, and through it, the taxpayers of Prince William County, to pay her an enormous sum of money with no proof that she is entitled to it. Her earlier attempts at trial did, unfortunately, meet with success. However, the serious injustices that the trial court did to the County and its Chief of Police were corrected by Fourth Circuit, applying standards of review that Officer Hetzel herself advanced.

Now she claims that the Court of Appeals cannot recognize an abuse of discretion when it sees one. She asks this Court to reverse the Court of Appeals, revive a verdict which it expressly found to be "outrageous," "grossly

excessive," and a "serious miscarriage of justice,"[2] and award her $176,293 in attorneys' fees even though she failed in her most significant claims, and regardless of the amount of damages that might ultimately be fixed in this case. She asks the Court to do all this on the basis of a Petition full of sound and fury, but which does not present any meritorious arguments. No justice would be served by granting a writ to her.

A. Factual Background

Officer Hetzel alleges that the Court of Appeals reversed the verdict because it conducted a review of the "cold paper record" and reached different factual conclusions than the jury and the trial judge. Although it did not adopt all of the trial court's interpretations of them, the Court of Appeals relied only upon those facts which were found by the trial court, or which Officer Hetzel did not dispute. The County and the Chief adopt the Court of Appeals' recitation of the facts in this case, and supplement them only to refute Officer Hetzel's myriad allegations of an egregious situation, which simply did not exist.

B. Correction of Factual Misstatements and Omissions in the Petition.

The Petition section entitled "Factual Predicates for Petitioner's Claims" recites "facts" which are almost entirely irrelevant to the issues she raises to this Court.[3] Officer Hetzel gives snippets of the evidence and asks this Court to conclude that the Court of Appeals, in making findings on

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[2] Petition Appendix ("App.") at 7a ("outrageous") and 8a ("grossly excessive" and "a serious miscarriage of justice").

[3] Further, the section reads as if these were the factual findings of the district court. They were not.

broader issues which seem to Officer Hetzel to conflict with these snippets, invaded the province of the jury. She tries to portray herself as a victim, of both the Defendants and the Fourth Circuit. In order to dispel any misimpression, the County and the Chief are compelled to correct the most glaring misstatements and omissions in the Officer Hetzel's statement of the facts in this case.[4]

Neither Prince William County nor its Police Chief have ever been found by a court or administrative agency to have discriminated against any employee on the basis of gender or national origin, or, indeed, on any basis prohibited by state or federal law.[5] The County and the Police Department are justifiably proud of this fact. It is true to this day, despite Officer Hetzel's claims.[6]

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[4] Any court reviewing the Petition should, as the Fourth Circuit did, look askance at Officer Hetzel's recitation of the facts. It bears noting that the district court found that "there is a likelihood that she would interpret any act of discipline as retaliation." App. at 26a. Second, the district court noted that she has a tendency to overreact. App. at 26a.

[5] The Police Department has 516 employees, 329 of which are sworn officers, like Officer Hetzel. Contrary to Officer Hetzel's assertions, she is not the only Hispanic female officer. The force is composed of men and women from a variety of racial and ethnic backgrounds.

[6] However, as a result of this case, the Police Department can no longer say that it has never been found guilty of retaliation. This is a painful situation with negative effects that reach beyond this case. This situation will never change, because, right or wrong, the finding made by a federal jury, was left in place by a federal court of appeals affording that jury finding the deference required by law. The Fourth Circuit's deference to the jury on this finding undercuts Officer Hetzel's suggestion that it was motivated to ignore the law to favor the County and the Chief.

1. Officer Hetzel's Record and the Conduct of the Department.

Officer Hetzel remains an employee in good standing. The Petition states that she is a certified crime scene technician, a hostage negotiation team member, a certified criminal justice instructor, and a four-time recipient of the Officer the Month award. It omits the fact that the Department trained her for and gave her these certifications and honors. She was appointed to the hostage negotiation team one month before this trial. Further, she has consistently received commendations and other accolades since she was hired.

She continues to omit mention of the fact that her performance evaluations were positive and they gave her the tools to prepare herself for promotion. First Sergeant John Collier, the witness to whom she points as providing corroboration for her damage claims, testified that Officer Hetzel's evaluations were normal in both their ratings and comments for an officer of her experience. The Court of Appeals noted that the last evaluation in the record "was nothing short of stellar." App. at 5a. Although they appropriately commented upon and rewarded her strengths, all of these evaluations noted her problems with accepting constructive criticism and her deficiencies in "people skills." She continues to insist that these deficiencies did not exist and that the Chief simply made them up to justify not promoting her. She did not appeal any of these evaluations. She was certainly not "victimized" with respect to receiving annual pay raises for good performance; and the Police Department told her repeatedly what it perceived her weaknesses to be.

Officer Hetzel continues to ignore the special training she received, and the opportunities she was given, and which

she threw away, to demonstrate supervisory skills and leadership ability. In 1990, she was appointed to the Management Planning Team, and failed, with no explanation, to attend its meeting. In the Spring of 1991, she was made a Field Training Officer, responsible for training rookie officers, and abruptly refused to continue training her assigned rookie, with no explanation to the rookie or to supervisors. In late 1991, she was made a team leader in the Team Policing Project, and she abruptly resigned her duties one month before the six-month pilot program ended, again, with no explanation. The Police Department did not "victimize" her by trying to hold her back. These failures were of her own making.

The Defendants have acknowledged since the beginning of this litigation that as a patrol officer, Officer Hetzel has, on balance, performed well. She has simply not been, to date, as qualified for promotion to sergeant as those who have been promoted.[7]

The Petition flatly misrepresents that her record has been "exemplary." She does not tell this Court that, by the time of trial, she had been disciplined three times. She was reprimanded in writing for missing a meeting, discipline she might not have received had she not already compiled a

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[7] In several footnotes to her Petition (4,5,6, and 7), Officer Hetzel relates aspects of the disciplinary records of other officers who were promoted. Even if she had not grossly mischaracterized the facts in these cases (see footnote 13, *supra*), not one of these people competed with her for a promotion, or were promoted instead of her. At trial and before the Fourth Circuit, she was able to draw no credible favorable comparison between herself and the people who were promoted to sergeant in the years she was eligible. This is another example of Officer Hetzel trying to inflame readers on a point that goes to liability, and not to the excessiveness of compensatory damages, which is the issue here.

history of lateness to roll call.[8] Her Petition does not reveal that she received an oral reprimand for threatening a suspect, using profane language as part of the threat, while swinging her nightstick at his head. She did not receive harsher punishment for that incident because she was strongly supported by First Sergeant G.W. Jones, whom she later named as a defendant in this case. She ridicules the Department for suggesting that she is not a "team player," but she omits to mention that she asked a black rookie officer where his white training officer was by saying "where is your master?" This conduct, which disrupted the squad and earned her a written reprimand, can hardly be deemed collegial and exemplary.

Whether this fact is material or not, she should not have described herself as a "team player" in light of the evidence at trial, unrebutted by her, that she made several unfounded Internal Affairs complaints about superiors and fellow officers ranging from simply silly to truly bizarre.[9] Again, this conduct undercuts her self-aggrandizing assertions.

2. <u>The Promotional Process.</u>

Importantly, the trial court refused to promote Officer Hetzel, saying that:

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[8] In her Petition, Officer Hetzel criticizes the Defendants for confronting her with a tardy slip but omits the facts that she accepted this reprimand at the time and that she had claimed at trial that there was no factual basis for any allegation that she was consistently late to work.

[9] Officer Hetzel complained that others did a variety of things to her, from yelling and pounding on a desk while talking to her to attempting to run her down with an automobile. None of these complaints were founded.

> The Court cannot grant plaintiff's motion with regard to the position of sergeant. The jury found that Defendants' failure to promote plaintiff to sergeant was not motivated by discriminatory intent. Although the jury may have found that the failure to promote was retaliatory, the verdict is too ambiguous to support the equitable relief requested by plaintiff. Having observed the plaintiff's demeanor at trial, *the Court is concerned that plaintiff does not now possess the temperament necessary to be an effective sergeant.*

App. at 26a (emphasis supplied). The Fourth Circuit affirmed the trial court on this point, noting:

> We can find nothing in the voluminous record in this case that even suggests that the district court abused its discretion, and *we will not order that someone be promoted to a higher level within a paramilitary organization where they lack the requisite qualifications to perform the duties of the job effectively.*

App. at 11a (emphasis supplied). Officer Hetzel has not petitioned this Court to review this aspect of the Court of Appeals' decision. Therefore, all of the discussion in the Petition about the promotional process is irrelevant.

From start to finish, this litigation has been her attempt to shoulder her way ahead of others who have had more experience and better records than she has. Now that she realizes that she cannot obtain a judicial promotion, she continues to mis-characterize the County's promotional process in hopes of reviving the outrageous damage award. [10]

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[10] In affirming the trial court holding that Officer Hetzel is not entitled to back pay, the Fourth Circuit noted: "With respect to back pay,

Officer Hetzel claims that even though she would not have earned more money as a sergeant, she is entitled to $500,000 in compensatory damages.[11]

Neither the Court of Appeals nor the trial court found that Officer Hetzel had been "victimized" by the Department because she has not been promoted. On average, 90 officers compete in each Assessment Center for promotion. She is on the same footing with many qualified officers who have not yet been promoted.[12]

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the evidence clearly showed that Hetzel earned more as a police officer than she would have earned as a sergeant, because officers, but not sergeants, are paid overtime." The only evidence introduced at trial on the relative pay rates of officers and sergeants was introduced by Officer Hetzel, and it was this evidence to which the Fourth Circuit referred.

[11] First, Officer Hetzel incorrectly suggests that the Chief of Police knows the Assessment Center ranking of officers and that he ordinarily promotes people in numerical order from that list. At trial, the Department proved that its written policies provide that the names of the top 20% of the applicants based on Assessment Center performance are sent to the Chief in alphabetical order. The Chief testified that, in accordance with written policy, the numerical rankings among the top 20%, which he does not know, are irrelevant when he makes a promotion decision. Officer Hetzel produced no evidence to show a pattern or practice of promotions based on numerical scores from the Assessment Center, once the top 20% of candidates is identified for the alphabetical list.

Second, she states that when she ranked second as a result of the 1994 Assessment Center, the officer who tied her score, a white male, was promoted. The evidence demonstrated that this male officer had *not* been promoted. Further, as the testimony of First Sergeant Collier, and Master Police Officer Louie Barr, both white males, indicated, officers who have been on the force substantially longer than Officer Hetzel have not been promoted.

[12] First Sergeant John Collier, a white male, testified at trial that he had been passed over 40 times.

3. The 1995 Internal Affairs Investigation.

Officer Hetzel's Petition does not mention the Internal Affairs Investigation which was begun against her in the week before the trial among the litany of wrongs she claims against the Department. Given her emphasis on this at trial, the finding of the Court of Appeals that this is one of only two allegations of wrongdoing on which she can, as a matter of law, recover compensatory damages, and the lack of restraint she displays elsewhere in her Petition, the omission is curious.[13]

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[13] For example, Officer Hetzel does not scruple to renew allegations of discrimination and harassment against G.W. Jones, who prevailed before the jury. Petition, footnote 7. She recites hearsay statements attributed to Lieutenant Toussaint Summers as if he testified in this matter. Petition, p. 7. He did not.

Her attorneys go beyond the bounds of zealous representation in mischaracterizing disciplinary actions against other employees, which are not material here in any event. If the County correctly recognizes the instances which she misdescribes, then these are the facts in those cases: the first officer referred to in footnote 4 of the Petition has never been disciplined for lying; he was suspended for misplacing evidence about a potential witness in a potential murder case. The "evidence" did not relate to the murder itself. His employment status was never on "probation;" he had been on the force, with an otherwise unblemished record, for a substantially longer period of time than Officer Hetzel at the time he was promoted to a position for which she did not compete.

The second officer, referred to in footnote 4 of the Petition, was never found to have committed domestic assault; he was engaged in two incidents of mutual affray with women. He was suspended for that conduct, and his punishment was never rescinded. The Chief made a decision not to make him prove that he had been to counseling, the same decision he made with respect to Officer Hetzel when he ordered counseling for her. This officer was promoted to a position for which Officer Hetzel did *not* compete after he went four years without another disciplinary incident.

Approximately two weeks before the trial, the Chief of Police received a complaint that Officer Hetzel had, the year before, first agreed and then refused to transcribe the tape of an interrogation she had conducted with an Hispanic suspect, in Spanish. As the allegation developed, the Chief learned that she had obtained a defective waiver of the suspect's *Miranda* rights, but she represented to the non-Spanish speaking detective present that she had obtained an appropriate waiver and proceeded to take the suspect's

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Officer Hetzel reported her conversation with the officer described in footnote 5 to her supervisor. She specifically declined to file any charges against the officer, who denied her allegations. The supervisor nonetheless investigated the allegation, and the Internal Affairs unit became involved in reviewing comments made by three members of the Vice Narcotics unit. This is the "investigation of racism in the Department" that Officer Hetzel misdescribes. This officer was disciplined. He was made detective, which was, at the time, a lateral reassignment and not a promotion, several years after this event, and no further allegation has ever been made against him.

The County and the Chief frankly do not recognize the second officer described in footnote 5. No officer testified at trial that he or she had ever used racial epithets against citizens, or to describe citizens.

In footnote 6 of the Petition, Officer Hetzel refers to the fact that Ron Sullins has, since the trial of this case, been promoted to Lieutenant. She fails to mention that she never made any allegation against Lieutenant Sullins before this litigation, that he took the stand and denied her allegations, and that no finding of discrimination, harassment, or retaliation has ever been made against him.

She makes this miasma of allegations against other employees in an apparent attempt to show that the Police Department is infested with race and gender bias, and that she was subjected to a hostile work environment, and she should recover a large sum, regardless of whether she is entitled to it as a matter of fact or law. Misstatement of the facts is never appropriate, but it is particularly offensive here, where the jury rejected her allegations of discrimination and harassment. This litany is irrelevant to her retaliation claim.

confession. When the tape was transcribed by an outside source after Officer Hetzel refused to do it (because of a personal problem she had with the prosecutor on the case), the confession was revealed to be defective and was suppressed by the Prince William County Circuit Court.

The prosecutor complained at the time to Officer Hetzel's supervisor, First Sergeant Collier, but the complaint was not documented or investigated. When he learned of it in January, 1995, the Chief ordered Internal Affairs to investigate the conduct of both Officer Hetzel and her supervisor. An Internal Affairs officer interviewed her for approximately 15 minutes on a night when they were both scheduled for regular duty, one week before trial. She did not allege at trial that the interviewer assaulted her, or threatened her, or raised his voice, or used any profanity toward her. After that interview, and after speaking with her attorney, she was distraught, and displayed emotion witnessed by other officers who later testified about it at trial. She composed herself and finished her shift. Ultimately, the investigation resulted in disciplinary action against Office Hetzel,. but she remains in good standing in the Department.

At trial, she portrayed this initial 15 minute interview as "shattering," and, indeed, it was the one incident in the record which the trial court felt "justified" the award of $500,000 in damages. The Fourth Circuit deemed this holding error as a matter of law, resulting in an outrageous verdict. There is no reason to review the Fourth Circuit holding.

REASONS WHY THE PETITION SHOULD BE DENIED

This Petition is another milestone in Officer Hetzel's sustained effort to prevail by obfuscation, distortion, and

omission of facts. Had the trial court exercised appropriate discretion, and had it reviewed this record on the Rule 50 and Rule 59 motions dispassionately and in accordance with well-established legal principles, it would not have confirmed the damage award of $500,000, and it would not have ordered the full amount of attorneys' fees sought. The Court of Appeals corrected the trial court's errors of law and abuses of discretion, and its decision should stand.[14] Indeed, Officer Hetzel has not advanced sufficient grounds in this Petition to set it aside.

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[14] In addition to finding that Officer Hetzel's performance at counsel table was evidence that should have been considered by the jury in fixing damages, the trial judge committed other errors of law. The Court of Appeals did not address these other errors, but they are worth noting, as they were raised by Defendants on appeal.

In ruling on the question of whether Officer Hetzel's lawsuit was public speech, protected by the First Amendment, the trial court held that "the number of reporters present throughout the trial and the interest with which this case was followed in the press demonstrate that matters of public concern were involved." Apart from the fact that this is not the proper test for determining when an employee's speech involves matters of public concern, there was absolutely no evidence presented at trial on the number of reporters present or whether the media actually reported on the case. App. at 16a.

Further, the trial court found that the fact that the Police Department investigated allegations of the use of racial epithets and issued a memorandum telling employees that such conduct would not be tolerated was proof that epithets had been used: "Whether the use of epithets in the department in 1989 rose to the level of a hostile environment is not before this Court. However, such language was clearly present enough to warrant an investigation and, thereafter, a department-wide memorandum addressing the problem..." App. at 17a-18a.

I. THE FOURTH CIRCUIT REVIEWED THE TRIAL COURT'S DECISION TO UPHOLD THE DAMAGE AWARD USING THE APPROPRIATE STANDARD OF REVIEW.

A. The Fourth Circuit applied the standard urged on it by Petitioner.

This Court has the prudential rule that issues that were not raised and addressed below, but which could have been, will not be addressed on a writ of certiorari unless extraordinary circumstances obtain. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed. 2d 15 (1980).

The Petition, filed last month, marks the debut of the Seventh Amendment argument in this case. Officer Hetzel urged the Fourth Circuit to follow the earlier Fourth Circuit holdings in *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992), and *Barber v. Whirlpool Corp.*, 34 F.3d 1268 (4th Cir. 1994).[15] The Court of Appeals relied on these cases, among others, in reversing the district court's refusal to find the damages excessive as a matter of law. The Court of Appeals' decision is announced using the terms established by these cases. App. at 4a - 9a. If Officer Hetzel believes that the standard of review established in these cases violates the Seventh Amendment, she should never have urged them on the Court of Appeals.

She might argue that this Court's decision this past June in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. ___, 116 S.Ct 2211, 35 L.Ed 2d 659 (1996) interpreted the Seventh Amendment in such a way as to make an argument

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[15] She continues to assert that *Barber* cites the correct standard for excessiveness of verdicts in civil rights cases. Petition at 21.

available that was not possible when this case was briefed and argued to the Court of Appeals. She would be wrong. *Gasperini* broadened, rather than narrowed, appellate review of damage awards.

In *Gasperini*, this Court remarked on the line of cases from the various federal circuit courts of appeal reversing denials of new trials because "the size of the verdicts seems to be too far out of line" and announced:

> We now approve this line of decisions, and thus make explicit what Justice Stewart thought implicit in our *Grunenthal*[16] disposition: "[N]othing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside [a jury verdict] as excessive." 393 U.S., at 164, 21 L.Ed. 2d 309, 89 S.Ct. 331 (Stewart, J., dissenting)

518 U.S. at ____, 116 S.Ct. at 2224,135 L.Ed 2d at 679. Before *Gasperini*, the existence of appellate review authority over trial court denials of new trials on these grounds was doubtful. As Officer Hetzel states in the Petition: "Indeed, this Court's precedent suggested, with fair uniformity, that such review was not available." Petition, at 12.

She did not raise the Seventh Amendment issue below, at a time when she had a better opportunity to prevail on that argument than she does now. In the wake of *Gasperini*, this Court ought to deny her Petition for that failure. Further, the Petition ought to be denied because the Seventh Amendment argument advanced by Officer Hetzel

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[16] *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed 2d 309 (1968).

fails as a matter of law. The Court of Appeals applied the standard of review implicitly approved in *Gasperini*.

B. The Fourth Circuit Found That the Trial Court Abused Its Discretion In Upholding the "Monstrous" Damage Award.

Gasperini addressed the question of how federal courts of appeals, reviewing a diversity action, should apply appellate standards of review established by state law. Assuming that *Gasperini* applies to the much different facts of this case,[17] the Fourth Circuit paid the deference to the decision of the trial court on the County's Rule 59 motion approved in *Gasperini*.[18]

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[17] This Court did not specifically define the term "abuse of discretion." As Justice Stevens noted in his dissent, "the majority carefully avoids defining too strictly the abuse of discretion standard it announces. To the extent the majority relies only on "practical reasons" for its conclusion that the Court of Appeals should give some weight to the District Court's assessment in determining whether state substantive law has been properly applied, I do not disagree with its analysis." *Gasperini*, 518 U.S. at ___, 116 S.Ct. at 2230, 135 L.Ed. 2d at 686.

[18] The County made two motions after the jury rendered its verdict in this case, one under Rule 50 and the other under Rule 59. In refusing the County's request that the award be substantially reduced commensurate with the evidence, the district court did not distinguish between the two motions, or state which one it was denying at that point. As a matter of law, the trial court should have reduced the damage award in this case, as the Fourth Circuit has done, based on the County's Rule 59 motion.

The Fourth Circuit distinguished the analysis for a Rule 59 motion from that appropriate for a Rule 50 motion with clarity in its holding in *Aetna Casualty and Surety Co. v. Yeatts*, 122 F.2d 350 (1941), a holding this Court cited with approval in *Gasperini*, 518 U.S. at ___, 116 S.Ct at 2222, 135 L.Ed.2d at 677. The Aetna Court noted:

It is well-established that appellate courts reviewing damage awards owe deference to the trial judge and jury, which had the opportunity to observe the witnesses. However, implicit in the *Gasperini* holding, and in the holdings of the cases which were its precursors, is the recognition that trial judges and juries can err and that excessive awards can and should be set aside:

> We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.

> The distinction between the rules to be followed in granting a new trial and directing a verdict were stated by us with some care in *Garrison v. United States*, 4 Cir., 62 F.2d 41, 42 from which we quoted with approval in the later case of *Roedegir v. Phillips*, 4 Cir., 85 F.2d 995, 996, as follows: "Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice.

122 F.2d at 353-354. The trial court apparently confused the two analyses, and Officer Hetzel consistently confuses the two inquiries in her Petition. She claims that, because there was some evidence in the record to support the jury verdict, the trial court was correct in confirming the damage award. That is not the appropriate inquiry under Rule 59, as the Fourth Circuit implicitly recognized in finding the award a miscarriage of justice.

Dagnello v. Long Island R. Co., 289 F.2d 797, 806 (2d Cir. 1961), cited in *Gasperini*, 518 U.S. at ___, 116 S.Ct. at 2244, 135 L.Ed.2d at 659. It has also long been recognized that a lower court which commits an error of law (such as making an obvious error as to where the "upper limit" on permissible damages in a case is), abuses its discretion. ("Indeed, it is a familiar, if somewhat circular, maxim that deems an error of law an abuse of discretion." *Gasperini*, 518 U.S. at ____, 116 S.Ct. at 2225, 135 L.Ed.2d at 687 Stevens, J., dissenting on other grounds).

The *Johnson* and *Barber* cases establish where the upper limit of jury verdicts is in civil rights cases of this sort. In applying them, the Fourth Circuit found that the outside frontier of the upper limit was exceeded when it found this verdict "outrageous" and a "gross miscarriage of justice." App. at 7a.

In this case, the trial court noted with particularity its reasons for finding the award appropriate. When the Fourth Circuit examined those reasons, it was justified in finding them unsatisfactory.[19] It is apparent from a reading of the trial court's opinion that, as the Fourth Circuit noted, [20] the

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[19] Officer Hetzel complains that the Fourth Circuit simply substituted its judgment for that of the trial judge. Of course, that is what happens when an appellate court finds that a trial judge has abused its discretion.

[20] Officer Hetzel continues to complain that her evidence of damage was unrebutted. However, there was no significant evidence to rebut. As the Fourth Circuit noted, the evidence "concerning Hetzel's emotional distress consisted almost exclusively of Hetzel's own, brief conclusory statements -- comprising less than ten pages of a joint appendix exceeding 5,000 pages..." App. at 5a. Further, while there were strong indications in the record that much of her distress came from her misperception that she was the victim of discrimination, she did not

district court engaged in "little analysis" of the verdict. App. at 5a. Further, the trial court's opinion is fraught with legal errors and inconsistencies which justified the Court of Appeals in rejecting much of the reasoning set forth in that opinion.[21]

The trial judge stated that the most important factor sustaining the size of the award in this case was that Hetzel was "crying and shaking throughout the trial." Officer Hetzel has not cited one case for the proposition that a litigant's display at counsel table is evidence, and the trial court erred as a matter of law in finding that it was.

The trial court made much of the testimony of First Sergeant John Collier to find corroboration for Officer Hetzel's claims of emotional distress. However, the trial court obviously ignored his testimony that Officer Hetzel told him she attributed much of her emotional stress to the sense that she was discriminated against. App. at 6a. She cannot recover for stress that was not caused by retaliation. Further, in refusing to promote her, the trial court noted that Officer Hetzel has a tendency to overreact to situations. Yet the trial court failed to take this tendency into account in assessing the damage award against the Defendants. It is incorrect as a matter of law to award compensatory damages for harm the Defendants did not cause.

The Fourth Circuit's review of this case was appropriate and necessary to ensure adherence to the purpose of civil rights litigation -- to compensate for harms suffered.[22]

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specifically tie any of the claimed emotional effects to a feeling of being retaliated against.

[21] See footnote 13, *infra*.

"An award of substantial compensatory damages ... must be proportional to the actual injury incurred.... The award must focus on the real injury sustained...." App. at 8a, quoting *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076, 1082 (4th Cir. 1987), *cert. denied*, 487 U.S. 1205, 108 S.Ct. 2847, 101 L.Ed. 2d 885 (1988).

Contrary to Officer Hetzel's dire predictions, the Fourth Circuit's opinion does not mean that successful plaintiffs in civil rights actions will be able to recover no more than nominal damages. It is simply another decision in a long line holding that plaintiffs can recover no more in compensatory damages than they prove to be entitled to at trial. The decision stands for the proposition that awards in these cases must be appropriate in light of the evidence; that they are not limited only by a jury's imagination, even if trial courts neglect their oversight duty. That proposition is a salutary one.

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[22] Officer Hetzel claims that, in reversing the damage award for lack of sufficient supporting evidence, the Fourth Circuit ignored this Court's holding in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed. 2d 295, (1993). In *Harris*, this Court held that a harassment plaintiff who can show the defendant's conduct was objectively offensive need not demonstrate that she herself suffered psychological injury in order to state a cause of action. It is a bald mischaracterization of the *Harris* holding to state that it says civil rights plaintiffs need not prove *any* injury in order to recover unlimited compensatory damages.

II. THE FOURTH CIRCUIT CORRECTLY ORDERED THE TRIAL COURT TO MAKE A REDUCED AWARD OF ATTORNEYS' FEES TO PETITIONER, WHO ATTAINED ONLY A SMALL FRACTION OF HER OBJECTIVES IN THIS LITIGATION.

Officer Hetzel claimed $176,293 in attorneys' fees at the end of the trial. She obtained supportable verdicts on only two out of ten counts, against two out of four Defendants.[23] Even if the $500,000 damage award were permitted to stand, it was only 1/17th of the relief she sought. She failed on all of her prominent claims, for promotion, back and front pay, and other injunctive relief. She championed no cause but her own.

The trial court's decision to grant her the full amount of attorneys' fees, without comparing the damages she obtained to the relief she sought, is found in two paragraphs at pages 24a and 25a of the Appendix to the Petition. The Court of Appeals set the trial court's decision on attorneys' fees aside when it found this trial court decision "clearly wrong" and because Officer Hetzel would not ultimately obtain any significant damage award in this case at all. App. at 9a-10a. Officer Hetzel argues that, even if the damage award is reduced as ordered by the Court of Appeals, she is still entitled, as a matter of law, to the full award, without regard to what she sought in this suit and what she ultimately obtained. She is incorrect.

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[23] It would, perhaps, be more fair to characterize the County and the Chief as one defendant, since the Chief was sued in his official capacity, and the jury was told that, for the purposes of this litigation, the County and Chief were one and the same.

In its most recent opinion on this issue, this Court held "[w]here recovery of private damages is the purpose ... of civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S.Ct. 566, 575, 113 L.Ed. 2d 494, 505 (1992) (quoting *Riverside v. Rivera*, 477 U.S. 561, 585, 106 S.Ct. 2686, 2700, 91 L.Ed. 2d 466, 486 (1986) (Powell, J., concurring in the judgment)).[24]

The Court of Appeals noted that "whereas Hetzel's complaint requested $9.3 million in damages, back pay, retroactive promotion to sergeant, and other injunctive relief, she will ultimately receive only a pittance of her original damages request and no injunctive relief, promotion nor back pay." App. at 9a-10a. Importantly, the Court of Appeals went on to quote this Court:

> We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. *A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.*

App. at 10a, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 439-40, 103 S.Ct. 1933, 1943, 76 L.Ed.2d 40, 54 (1983) (emphasis in Court of Appeals opinion).

The Court of Appeals has merely remanded the attorneys' fees award to the trial court for reconsideration in light of the ultimate damage award and the correct legal

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[24] Despite the fact that the Court of Appeals based its decision on attorneys' fees on the *Farrar* decision, Officer Hetzel does not address this case at all in her Petition, much less indicate why the Court of Appeals' reliance on it is misplaced.

principles. It has established no ceiling on attorneys' fees. It is, therefore, premature for Officer Hetzel to complain that the Court of Appeals has established any "rule of proportionality," or that the ultimate award will be unfair. Officer Hetzel's argument that the trial court need not consider the scope of her success in relation to her initial claims has no merit, and her claim that the trial court will apply the Court of Appeals' direction in an unlawful manner is unripe.

III. THE FOURTH CIRCUIT CORRECTLY REFUSED TO DEEM CERTAIN ALLEGED WRONGFUL ACTS AS "ADVERSE EMPLOYMENT ACTIONS" FOR WHICH PETITIONER COULD RECOVER COMPENSATORY DAMAGES,

Because Officer Hetzel argued to the Court of Appeals that the damage award in this case was "easily justified by the numerous adverse actions taken by [Defendants]" (App. at 4a), the Court addressed that allegation by examining the alleged actions. It found that "only the alleged failure to promote and the 1995 I.A. investigation can even possibly constitute adverse retaliatory action, as the other acts either were taken outside the statute of limitations or did not deprive Hetzel of a valuable government benefit." App. at 4a. She wants this Court to find that the "other actions" found by the trial court (App. at 18a) are legally adverse actions for the purpose of retaliation analysis.[25] The writ ought to be denied because this argument has no merit and is moot at this point.

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[25] Although the Court of Appeals lists "poor performance evaluations" among those actions it declined to find as adverse, the trial court did not find that Officer Hetzel's performance evaluations had been negative, and did not list evaluations along with the "other adverse actions."

Further, there were no alleged "other acts" within the statute of limitations that the jury did not address and reject as actionable. Effectively, the Court of Appeals did not rule that any of the alleged acts "failed to deprive Hetzel of a valuable government benefit."

In the first place, the Court of Appeals did not vacate the finding of retaliation; it reversed and remanded the award of compensatory damages. It is a point so familiar and well-established as to require no citation that compensatory damages are calculated to address the effects a plaintiff has suffered as a result of wrongdoing. Courts must focus on the condition of the plaintiff, not the behavior of the defendant, which is a more appropriate inquiry in the context of punitive damages. As a matter of law, then, the number or type of "adverse actions" makes no difference to the assessment of the appropriate level of damages to award on two counts of retaliation. The Court of Appeals' view of adverse actions in the context of damages is, therefore, moot.

Further, the "other actions" were all, with one exception, outside the statutes of limitation that applied in this case.[26] The one exception is the trial court's finding of unspecified "abusive treatment," which the jury had already addressed and rejected when it found that none of the Defendants had harassed Officer Hetzel by creating a hostile and offensive working environment within the statutes of limitation.

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[26] Those dates were July 13, 1992, for the First Amendment claim, and January 29, 1993 for the Title VII claim. The district court cited denial of transfers as adverse. The evidence clearly established, with no rebuttal from Officer Hetzel, that only two transfers were ever denied to her -- in September of 1990 and February of 1992. Disparate disciplinary treatment was also cited. Officer Hetzel received her last disciplinary action, before the trial of this case, in August of 1991.

IV. THE COURT OF APPEALS' FINDING THAT PETITIONER'S CROSS-APPEAL WAS MOOT OR THAT IT WAS WITHOUT MERIT, EVEN THOUGH MADE SUMMARILY, DOES NOT AMOUNT TO A "REFUSAL" TO CONSIDER HER APPEAL.

Officer Hetzel claims in her Petition that the Fourth Circuit Court of Appeals, by its wording in footnote 2 to its opinion (App. at 8a) "refused" to consider her cross-appeal. However, her assertion that the Court of Appeals "simply declined to address this issue, at all," flies in the face of the specific language of Footnote 5:

> Both parties raise numerous other issues. We have *carefully considered each issue* and have concluded that the remaining claims either have not been properly preserved for appeal or are without merit."

App. at 11a (emphasis supplied).

The Court of Appeals was correct in determining this issue to be without merit, even if it simply announced its determination in a footnote. As a matter of law, Officer Hetzel's claim that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits pure retaliation, in the absence of any finding of discrimination, is without merit.[27]

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[27] Officer Hetzel continues to allege in her Petition, as she did to the trial court, that because the Defendants did not specifically state, as part of their two Rule 50 motions during the trial, that the Equal Protection Clause does not prohibit retaliation devoid of discrimination, the trial court had no jurisdiction to set the verdict on that count aside. The trial court correctly found that it had jurisdiction. Even assuming that

It is axiomatic that discrimination against a person because of membership in a protected class violates the Equal Protection Clause, and retaliation against a person for filing a charge of such discrimination violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e)(3)). However, it has not been established that the Equal Protection Clause provides a cause of action for retaliation in the absence of any finding of discrimination. By its terms, the Equal Protection Clause protects membership in particular classes, not conduct.[28]

In *Gray v. Lacke*, 885 F.2d 399 (8th Cir. 1988), *cert. denied*, 494 U.S. 1029, 110 S.Ct. 1476, 108 L.Ed. 2d 613 (1990), the Court of Appeals for the Eighth Circuit addressed the issue Officer Hetzel presents here and rejected the Equal Protection retaliation claim. The Court explained:

> Gray's complaint makes numerous allegations to the effect that the appellees harassed and retaliated against her because she openly complained about and filed grievances over sexual harassment and sex

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the Defendants had failed to raise the issue in the Rule 50 motions, the question of whether the Equal Protection Clause creates a cause of action where no discrimination is found is a legal one. Since no evidence Officer Hetzel could produce would change the terms of the Fourteenth Amendment, the basic purpose behind Rule 50(b)'s prohibition on addressing motions for judgment n.o.v. did not exist here. The trial court could, therefore, refuse to confirm a verdict on a cause of action that did not exist as a matter of law. *FSLIC v. Reeves*, 816 F.2d 130 (4th Cir. 1987).

[28] The First Amendment protects conduct to the extent that it can be characterized as speech. Thus, the First Amendment might support a cause of action for retaliation for false claims of discrimination. In fact, Officer Hetzel obtained a verdict of retaliation in violation of the First Amendment.

> discrimination within the Dade County Sheriff's Department. The allegations, however, do not show that Gray has been discriminated against because she is a member of a particular class. The appellees allegedly retaliated against her because of her conduct, not because she is a woman.
>
> *Gray's right to be free from retaliation for protesting sexual harassment and sex discrimination is a right created by Title VII, not the equal protection clause. See 42 U.S.C. §2000e-2. Section 1983 provides a remedy for deprivation of constitutional rights. It supplies no remedy for violation of rights created by Title VII.*

Gray, at 414 (emphasis supplied).[29]

Officer Hetzel cites no authority in her Petition, and she cited no authority below for the proposition that the Equal Protection Clause creates a cause of action for pure retaliation.[30] Causes of action do not exist by negative

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[29] The Fourth Circuit has adopted the reasoning of the Eighth Circuit on this point, holding that a 42 U.S.C. §1983 plaintiff must demonstrate a violation of the First Amendment to make out a claim for pure retaliation; necessarily implying that the Fourteenth Amendment is not the source of such a cause of action. *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994).

[30] She cites *Davis v. State University of New York*, 802 F.2d 638 (2d Cir. 1986); *Kellner v. General Refractories Co.*, 631 F.Supp. 939 (N.D. Ind. 1986); and *Downey v. Isaac*, 622 F. Supp. 1125 (D.D.C.), *aff'd without opinion*, 794 F.2d 753 (D.C.Cir. 1986), and says that the law is well-settled in this area. These cases deal with claims of retaliation, arising under Title VII, rather than under the Equal Protection Clause. In no way, shape, or form do these cases settle, or even address the application of the Equal Protection Clause to protect conduct. In fact, the *Davis* court dismissed all claims under the Equal Protection Clause at

implication; particularly where suit is brought under §1983, which creates no substantive rights on its own. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 2d 405, *reh. denied* 425 U.S. 985, 96 S.Ct. 2194, 48 L.Ed. 2d 811 (1976). See also *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1205 (6th Cir. 1984) (retaliation is not a proper basis for a §1983 claim).

Because the trial court and the Fourth Circuit correctly rejected Officer Hetzel's cause of action for pure retaliation under the Fourteenth Amendment, the Petition should be denied on this issue.

CONCLUSION

In summary, the Petition presents no important question which has not already been addressed by this Court. The decision of the Fourth Circuit appropriately applied prior decisions of this Court, and is not in conflict with decisions in other circuits. For the foregoing reasons, the writ of certiorari should be denied. Further, the Seventh Amendment issue raised by the Petition should have been addressed to the Fourth Circuit, and the question of whether attorneys' fees will ultimately be appropriate in light of Officer Hetzel's success in this matter is not now ripe for decision. Finally, the Fourth Circuit reversed and remanded a trial court decision confirming an outrageous verdict, which was a clear error as a matter of law and an abuse of discretion. For these reasons, the Petition for Writ of Certiorari should be denied.

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trial; the case proceeded to the appellate court on Title VII allegations alone. The plaintiffs in *Kellner* and *Downey* made their allegations under Title VII alone.

Respectfully submitted,

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